S. HRG. 110–773

RESTORING CONGRESSIONAL INTENT AND PROTECTIONS UNDER THE AMERICANS WITH DISABILITIES ACT

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE AMERICANS WITH DISABILITIES ACT (PUBLIC LAW 101–336), FOCUSING ON S. 1881, TO AMEND THE AMERICANS WITH DISABILITIES ACT OF 1990 TO RESTORE THE INTENT AND PROTECTIONS OF THAT ACT

NOVEMBER 15, 2007

Printed for the use of the Committee on Health, Education, Labor, and Pensions

Available via the World Wide Web: http://www.gpoaccess.gov/congress/senate

U.S. GOVERNMENT PRINTING OFFICE

39–388 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

EDWARD M. KENNEDY, Massachusetts, *Chairman*

CHRISTOPHER J. DODD, Connecticut	MICHAEL B. ENZI, Wyoming,
TOM HARKIN, Iowa	JUDD GREGG, New Hampshire
BARBARA A. MIKULSKI, Maryland	LAMAR ALEXANDER, Tennessee
JEFF BINGAMAN, New Mexico	RICHARD BURR, North Carolina
PATTY MURRAY, Washington	JOHNNY ISAKSON, Georgia
JACK REED, Rhode Island	LISA MURKOWSKI, Alaska
HILLARY RODHAM CLINTON, New York	ORRIN G. HATCH, Utah
BARACK OBAMA, Illinois	PAT ROBERTS, Kansas
BERNARD SANDERS (I), Vermont	WAYNE ALLARD, Colorado
SHERROD BROWN, Ohio	TOM COBURN, M.D., Oklahoma

J. MICHAEL MYERS, *Staff Director and Chief Counsel*
KATHERINE BRUNETT MCGUIRE, *Minority Staff Director*

C O N T E N T S

STATEMENTS

THURSDAY, NOVEMBER 15, 2007

ADDITIONAL MATERIAL

RESTORING CONGRESSIONAL INTENT AND PROTECTIONS UNDER THE AMERICANS WITH DISABILITIES ACT

THURSDAY, NOVEMBER 15, 2007

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:00 p.m., in Room SD–430, Dirksen Senate Office Building, Hon. Tom Harkin, presiding.

Present: Senators Harkin and Murray.

OPENING STATEMENT OF SENATOR HARKIN

Senator HARKIN. Again, I want to welcome all of you here, I apologize for being a little late, I'm trying to get a Farm bill through also at the same time. That's tough this time of the year, no pun intended.

Thank you all for being here and I welcome you all to the Senate's first hearing on S. 1881, the Americans with Disabilities Act restoration.

Very much like the original Americans with Disabilities Act in 1990 this current bill is going forward in the spirit of genuine bipartisanship.

My principal co-sponsor in the Senate is Senator Arlen Specter of Pennsylvania. A companion measure on the House side is co-sponsored by the Majority Leader Hoyer, and the former chairman of the House Judiciary Committee, Congressman Jim Sensenbrenner.

The House bill now has 235 co-sponsors on both sides of the aisle.

The ADA was one of the landmark civil rights laws of the 20th Century. Americans take enormous pride in the progress we've made in advancing the laws four goals for people with disabilities: equality of opportunity, full participation, independent living and economic opportunity.

Nobody wants to go backwards. But the harsh reality is that today we are going backwards. In a series of decisions, the U.S. Supreme Court has narrowed the ADA in ways that directly contradict the clear intent of Congress.

When we wrote the ADA, we took the definition of disability from Section 504 of the Rehabilitation Act of 1973, a statute that was well-litigated and understood. Conditions that were commonly un-

derstood to be a disability included amputation, diabetes, epilepsy, intellectual disabilities, bi-polar disorders, and multiple sclerosis.

In the Senate Labor and Human Resources Committee report we said, and I quote,

> "Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations, or auxiliary aids."

Yet in a series of decisions in 1999, the court ruled that mitigating measures, prosthetics, medication, hearing aids and so on must be considered in determining whether a person has a disability under ADA.

Compounding this error, in 2002 the Court rules that there must be, "A demanding standard for qualifying as disabled." Together, these U.S. Supreme Court cases have created a supreme absurdity. People with serious disabilities are held to conditions such as a missing limb or epilepsy who are fortunate to find treatments that make them more capable and independent, and more able to work, may find they are no longer covered by the ADA.

This means that when individuals, people who—by any common sense standard—are disabled, believe they have been victims of discrimination, they have no recourse. It has gotten so bad that just last spring a lower court concluded that a person with what is commonly called mental retardation, was not disabled under the ADA.

In another case, an individual with epilepsy who had, "only" one 15-second seizure per week, on average, was not considered to be disabled. And thus, not entitled to the protections of the law.

In yet another recent case, a woman missing her right forearm and hand was ruled to be not disabled under the ADA. Courts have even denied protection under ADA in cases where the employer openly admitted to firing someone because the Court held they weren't disabled, so they weren't protected by the ADA.

As others have noticed, this has created a odd Catch–22 situation. An employer may fire a person for being disabled, and then argue that they cannot be sued, because the person is not disabled enough to be protected by the ADA. That was the experience of Mr. Orr, who's testifying here today.

There's no question that this is a very serious problem. A 2006 study found that plaintiffs have lost more than 97 percent of ADA employment discrimination claims, more than any comparable civil rights statute. Studies have shown that a clear majority of the cases are being lost, because courts are holding that plaintiffs are not disabled.

I can tell you with certainty, and so can I believe our witnesses today, this is not what Congress intended when we passed the law. We need a legislative fix to return us to the original intent of the ADA. And that's what S. 1881 does, it restores Congress' original intent by clarifying that anyone with an impairment, regardless of a successful use of mitigating measures, is entitled to seek reasonable accommodations in the workplace, and when necessary, attempt to prove that they have been victims of discrimination.

This bill is profoundly important to millions of people with disabilities.

I would point out there's one group, in particular, that has a major stake in this legislation. Many thousands of men and women

are returning from combat in Iraq and Afghanistan with missing limbs, traumatic brain injuries, Post-Traumatic Stress Disorder and other disabilities.

Currently, these courageous people are still in uniform, still focused on recovery and rehabilitation. But eventually, they will return to civilian life, where they will seek opportunities to be independent, economically self-sufficient and fully included. If they encounter discrimination based on a disability, and if they seek redress under the ADA, they will likely find themselves, among those, no longer viewed as disabled under the ADA. We simply cannot allow this to happen, not to war veterans, not to any Americans.

We cannot go back to the old days of denial, disenfranchisement and discrimination, and that's why we need a common sense remedy, as provided in S. 1881.

We have an excellent panel of witnesses this afternoon. I'm especially pleased that three of these witnesses were deeply involved in the drafting and negotiating and passing of the ADA in 1990. They can speak authoritatively about not just the congressional intent, but what was the understanding of the Administration that strongly supported it under President Bush, the passage of the ADA.

Let me briefly introduce the members of our panel. The Honorable Dick Thornburgh, former Governor of Pennsylvania, U.S. Attorney General from 1988 to 1991, was a key negotiator on behalf of President Bush as we moved forward with the ADA. He will testify from the Administration's perspective as to who was intended to be covered under the law's definition of disability.

John Kemp, currently an attorney with Powers, Pyles firm, the former board member of the National Council on Disability, former head of Very Special Arts. He was a key advocate in support of the ADA, back in 1990. Mr. Kemp uses both leg and arm prosthesis, as he has noted, he might not be considered a person with a disability under the U.S. Supreme Court's current interpretation. John was very helpful in 1999 on the ADA.

Professor Chai Feldblum is a Director of the Federal Legislation Clinic at the Georgetown University Law Center, again, deeply involved with many of us in the late 1980s, leading to the passage of the ADA in 1990, is a recognized national authority on the law's history and legislative language and congressional intent behind the law.

As I mentioned earlier, Steven Orr was the plaintiff in a claim filed under the ADA against Wal-Mart. He's a pharmacist, he has diabetes, he asked Wal-Mart for permission to take 30 minutes each day to eat lunch as a reasonable accommodation to control his diabetes. His request was denied, he was fired, he sued under ADA, his claim was rejected, under the Court's law that he's not disabled.

Camille Olson is a partner with the law firm of Seyfarth & Shaw in Chicago. She has practice in the areas of employment discrimination counseling and litigation defense for more than two decades. Ms. Olson is a frequent lecturer and author, also a member of the U.S. Chamber of Commerce's Policy Advisory Committee on equal employment opportunity measures.

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00007 Fmt 6633 Sfmt 6633 S:\DOCS\39388.TXT DENISE

Again, I thank all of you for being here, I thank, especially, our witnesses, some of whom came a great distance. But more than that, I thank so many of you who were involved back in those days of the 1980s, leading up to the passage of the bill.

For those of us who were here at that time and worked through that, it's always kind of a shock to me when I talk to people who don't know what we went through. Many Senators that I serve with now were not here then, as so many members of the House were not here then. They don't know that history of what went on then.

It's good to see three of the people, who were here who do know the history, who were intimately involved in it.

I think what I'll do, since I've introduced all of you, I'll just start down the line. I'll start with Mr. Kemp first, and please take whatever time you need, John, and then we'll just go on with Attorney General Thornburgh on down the line, we'll just hear from each of you, then we'll open it up for discussion.

John, welcome back, it's good to see you.

STATEMENT OF JOHN D. KEMP, ATTORNEY, POWERS, PYLES, SUTTER & VERVILLE, P.C., WASHINGTON, DC.

Mr. KEMP. Thank you, Senator, it's a privilege to be here.

I am an American, a proud American with a disability, born with arms or legs, off essentially at the elbows and the knees. I use mitigating measures. Four prostheses that have enabled me to be gainfully employed all my work life, and without which employment would have been very difficult.

Unlawful discrimination is un-American. America is the beacon of light to the world because our country is based on the principles of hope, fairness, and equality of opportunity. We expect that people will be judged on the basis of their abilities, not on the basis of ignorance and prejudice. Unfortunately, our Nation has not fared well in applying these principles to people with disabilities.

Justice Thurgood Marshall summarized our disability policy as "grotesque" and "worse than the worst excesses of our Jim Crow laws."

In 1973 and 1974, Democrats and Republicans came together in a bipartisan show of support and banned discrimination on the basis of disability by Federal financial recipients, as well as Federal contractors.

Section 504 of the Rehab Act banned discrimination against three groups: persons with actual impairments that substantially limited their major life activities, persons with no actual current impairments, but who had histories of such impairments, and person who have never had any actual impairments but were regarded, that is, treated as if they had such impairments by others.

In the words of the U.S. Supreme Court, in the Arline decision as included in the Senate's ADA report, section 504 acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as the physical limitations that flow from actual disabilities.

Thus, under section 504, our friends, neighbors and family members, with the following impairments, among others, enjoy protections again discrimination regardless of whether or not they took

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00008 Fmt 6633 Sfmt 6633 S:\DOCS\39388.TXT DENISE

mitigating measures to make themselves more employable: epilepsy, insulin-depending diabetes, paraplegia and quadriplegia, deafness and hard of hearing, blindness, including persons who are legally blind, multiple sclerosis, intellectual disabilities—such as mental retardation—manic depression and HIV infection.

In 1989 and 1990, when Congress and the business and disability communities considered passage of the ADA, these interpretations of section 504 were recognized and accepted by all.

For example, with respect to mitigating measures, the Senator's report stated, "Whether a person has a disability should be assessed without regard to the availability of mitigating measures." Comparable statements appeared in the House report.

The committee reports also included numerous examples of persons considered to have a substantial limitation of a major life activity. For example, a person who is hard of hearing is protected, even though the loss may be corrected through the use of hearing aids.

Likewise, persons with impairments such as epilepsy or diabetes were considered to have a substantial limitation of a major life activity, even if the effects of the impairment were controlled by medication.

On a personal note, as you have indicated, my right to challenge discrimination on the basis of disability is clear and unequivocal. I have no hands and feet. The Senate and House reports clearly gave me the right to challenge discrimination on the basis of disability, without regard to the availability of mitigating measures, as in my case, my prostheses.

The focus of the ADA is not on whether, with my prostheses, I can comb my hair, brush my teeth, or perform major life activities. The focus of the ADA is on whether I can prove that an employer denied me a job or a promotion unlawfully, on the basis of disability.

The committee report also made it clear that section 504 included persons who did not have actual, substantially limiting impairments, as well as persons with no actual impairments whatsoever.

As the House report explains, section 504 applies whether or not a person has an impairment, if the person was treated as if he or she had an impairment that substantially limits a major life activity.

Congress was concerned that individuals would be denied employment as a result of negative attitudes and misinformation, such as women in remission from breast cancer. Persons with burns or disfiguring scars, and persons associated with persons who are HIV-infected, but did not have the infection themselves.

Thus, when the agreement was struck between the business and disability communities, and the Members of Congress from both sides of the aisle and the Bush administration, the intent was clear and unmistaken. ADA protects, and was to be available for all individuals who are subjected to adverse treatment based on actual or perceived impairment, or by the failures to remove societal or institutional barriers. Unfortunately, the U.S. Supreme Court in the *Sutton* trilogy of cases, ignored congressional intent. In a shameful

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00009 Fmt 6633 Sfmt 6633 S:\DOCS\39388.TXT DENISE

display of judicial activism, the majority stated, "We have no reason to consider the ADA's legislative history."

Because of the U.S. Supreme Court's pronouncements, lower courts have denied protections against discrimination on the basis of disability to many of the person explicitly identified by Congress and the Bush administration to be protected.

One of the most egregious decisions was recently handed down by the 11th Circuit Court of Appeals. That Court denied protection against employment discrimination to a 29-year-old man who was diagnosed with mental retardation, who currently is receiving cash benefits under SSI, because of the severity of his disability, and who has the intellectual functioning of an 8-year-old, according to the Court.

Senators, using the reasoning of the U.S. Supreme Court regarding mitigating measures, a judge could easily deny protection against disability discrimination to wounded warriors returning from Iraq, who have been fitted with state-of-the-art prostheses.

Unlike the courts, Congress has every reason to consider ADA's legislative history. I urge you to restore the rights and protections agreed to in 1990 by members of the disability and business community, by Members of Congress and the Bush administration. People should not be subjected to discrimination on the basis of disability, whether based on actual or perceived impairment.

Over my 30 years of working with the business community, I can unequivocally say, the structure of the ADA Restoration Act is fully consistent with the approaches taken by progressive companies, which are to provide accommodations for all of their employees, in order to maximize their productivity, and thus their profitability. That's what business really cares about.

We must, once again, come together and say no to discrimination and yes to hope, fairness and equality of opportunity for all. Thank you.

[The prepared statement of Mr. Kemp follows:]

PREPARED STATEMENT OF JOHN D. KEMP

I. INTRODUCTION AND RECOGNITION

Good morning. As I prepared for today's testimony and reviewed the substantial history and documentation surrounding the momentous passage of the Americans with Disabilities Act, there was a certain reference that I stumbled upon again and again. It was a reference to the promise of the founders, articulated with simple grace more than 230 years ago:

> "We hold these truths to be self-evident—that all [people] are created equal. That they are endowed by their creator with certain inalienable rights."

How appropriate these words were for that occasion, and for this one. For those words have served as a beacon for all of us—and for the world—toward which we continue to strive.

But the history of our Nation has shown that "equality" under the law is not a gift that is easily given, but instead is a treasure of the most sacred kind, which must be fought for and protected in order to be gained and held. This country has seen many such battles, including those against the dark legacies of racial and gender discrimination. It is through these struggles that we as a nation, and as individuals, move closer to the ideal and the truth upon which this country was founded.

In 1990, 216 years after Thomas Jefferson scripted his most famous words, and its promise was made, and 26 years after the passage of the Civil Rights Act, this body came together and, in an extraordinary, bipartisan manner, said no to discrimination on the basis of disability. With the passage of the Americans with Disabilities Act, this Nation took a monumental, long-awaited step in its long journey toward full and equal rights for all of its citizens.

The heroes of the ADA are here with us today: Senator Tom Harkin, sponsor of the ADA whose tireless commitment and deep dedication made the achievement possible. Senator Bob Dole, who guided and shepherded this legislation from the outset and whose unwavering leadership has served as an inspiration to all. Attorney General Dick Thornburgh, who played such a critical role in supporting and enforcing the legislation. Congressmen Tony Coelho, Steny Hoyer and Steve Bartlett who championed the cause of equality and inclusion for people with disabilities.

The heroes of the ADA also included members of the disability and business communities who were willing to work together with Members of Congress to draft the ADA and the committee reports reflecting clear and unambiguous congressional intent. To these individuals, and to the many, many others who worked to make the ADA a reality, we say "thank you."

Thank you, because in 1990, largely as a result of your work and commitment, we recognized, acknowledged, and sought to alter forever the dark history of discrimination on the basis of disability; a history fraught with ignorance, indignity, suffering, exclusion, and waste of human life and potential. A history of segregation and discrimination that, in the words of civil rights champion and Supreme Court Justice Thurgood Marshall, "in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow."

II. HISTORY OF DISCRIMINATION IN THE UNITED STATES

I am by nature an optimist, and today is about looking forward with hope, determination, and with the aim of ensuring the greater success of the Americans with Disabilities Act. It is important to pause and remember this difficult history, a history that included, until very recently, laws that prohibited certain American citizens from appearing in public. A Chicago ordinance in effect until 1974 imposed a fine upon any individual who "exposes himself to public view" who was "diseased, maimed, or in any way deformed so as to be an unsightly or disgusting object."

Discrimination on the basis of disability also permeated our public schools. Until 1975, the State of Maine had a statute which gave the school board the authority to "exclude from the public schools any child whose physical or mental condition makes it inexpedient for him to attend." This same policy was reflected in legislation in virtually every State in the Nation.

In 1919, the Wisconsin Supreme Court upheld the exclusion from school of a child with cerebral palsy, writing that the child's appearance produced a "depressing and nauseating effect" upon his teachers and the other children that his condition required "undue" time and attention of the teacher, and that he "interferes generally with the discipline and progress of the school." The court concluded that the child's presence was "harmful to the best interests of the school."

Forced sterilization on the basis of disability was also permitted in this country. In 1927, the U.S. Supreme Court addressed the constitutionality of a State law which allowed the sterilization of institutionalized people with mental disabilities. The court upheld the law, and acclaimed Justice Oliver Wendell Holmes wrote:

> "In order to prevent our being swamped with incompetence, it is better for all the world, if instead of waiting to execute the degenerate offspring for crimes, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

And particularly in the 20th century, children as well as adults were often subject to lives of forced institutionalization on the basis of disability. They were hidden from public view, isolated from family and friends and excluded from the mainstream of life. Leading medical authorities began to portray people with mental disabilities as "a menace to society and civilization . . . responsible in large degree for many, if not all, of our social problems."

It was said that people with intellectual disabilities caused "unutterable sorrow at home and are a menace and danger to the community." They were considered a danger to the "social, economic, and moral welfare of the State."

And there were, of course, the more insidious forms of "every day" discrimination: social ostracization, the inaccessibility of retail establishments, eating establishments, public transportation, places of public gathering, and job sites.

Justice Marshall summed up this unfortunate history well when he observed that "Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction and nearly extinguish their race. Many disabled children were categorically excluded from public schools, based on the false stereotypes that all were uneducable and on the purported need to protect non-disabled children from them. State laws deemed the retarded "unfit for citizenship." Justice Marshall concluded that persons with disabilities have been subject to a history of discrimination that is both tragic and grotesque. In the words of former Senator Lowell

Weicker, people with disabilities spend a lifetime "overcoming not what God wrought but what man imposed by custom and law."

This brief review of our Nation's history of discrimination on the basis of disability provided the backdrop for the comprehensive reports and clarion call for action by 15 members of the National Council on Disability appointed by President George H.W. Bush. Based on reports by NCD and others, Congress concluded that there was a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability.

The statement of findings in the ADA and the Senate and House committee reports explain the purposes of the ADA. The committee reports, in the words of Senator Dole sought to put an end to "prejudice, isolation, discrimination, and segregation," and to address and dispel the myths and false perceptions of people with disabilities, which have formed the basis for past misguided policies.

The committee reports make several clear, unequivocal statements of intent. First, discrimination on the basis of disability includes denying equal opportunity to persons who have actual impairments that substantially limit major life activities (i.e., more than minor or trivial impairments). Examples included discrimination on the basis of deafness, blindness, paraplegia, HIV, developmental disability, mental illness. The House and Senate Reports also make it clear that persons with medical conditions that are under control such as persons taking medication for diabetes and epilepsy and high blood pressure may make claims of discrimination on the basis of disability. In other words, whether a person has an actual impairment should be assessed without regard to the availability of mitigating measures.

Second, discrimination on the basis of disability includes denying equal opportunity to an individual who does not have an impairment but simply has a record of an impairment. Congress concluded that it is critical to protect individuals who have recovered from an impairment as well as persons who had been misclassified as having an impairment. Examples include persons with histories of mental or emotional illness, heart disease, or cancer; examples of those misclassified as having an impairment include persons misclassified as mentally retarded.

Third, discrimination on the basis of disability includes denying equal opportunity by taking adverse action against an individual whether or not the person has an actual impairment i.e., a person who is regarded as having a disability. Congress explained that it wanted to protect individuals from discrimination because of the negative reactions of others. The House and Senate committee reports quote the U.S. Supreme Court case of School Board of *Nassau County* v. *Arline* (interpreting Section 504 of the Rehabilitation Act), "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."

For example, if a an employer refused to hire someone because of a fear of the negative reactions of others to the individual or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be able to make a claim of discrimination under the ADA.

In sum, Congress correctly intended the ADA to protect all individuals who are subjected to adverse treatment based on actual or perceived impairment, or record of impairments or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning disability or particular disabilities, or by the failure to remove societal and institutional barriers.

III. THE TOPIC OF TESTIMONY: EMPLOYMENT—RECENT CASES

One of the primary areas that the ADA sought to address was that of employment. As was recognized by those who worked so hard for the passage of the ADA, denial of equal employment opportunity on the basis of disability debases and undermines the quest for equality and dignity. Discrimination on the basis of disability perpetuates exclusion and separation; it contributes to the false perception that some people are less than capable, or not equally capable, and cannot contribute or compete in the mainstream; and it creates and compels dependence on government subsidies and programs without fair access to competitive employment; In short, discrimination on the basis of disability perpetuates the cycle of segregation, isolation, and poverty.

Discrimination on the basis of disability in employment not only limits dreams and encourages alienation and economic dependence, it weakens our Nation as a whole. As President George H.W. Bush stated in 1991, "No nation, no matter how wealthy, has ever been able to afford the waste of human talent and potential. That is particularly true today," he wrote, "as the world economy continues to grow in

size and sophistication."[1] The President's words have the same force today as they did 16 years ago, perhaps more. In the growing global economy, and increasingly competitive global workplace, this country cannot afford to overlook one of its greatest human resources—a population of willing, capable, talented, and competent Americans—who stand ready to contribute.

In a nutshell, in the words of Senator Dole, the ADA offered "accessible environments and reasonable accommodations to empower persons with disabilities to utilize their full potential." So, in 1990 we were off to a wonderful start—a start that was in sync with the clear intent of this body.

Unfortunately, however, *the promise of that start has not come to fruition*. Not because of any lack of diligence by Congress and all those who labored to bring about this historic legislation—but because of mistaken, limiting constructions of its intent and meaning. Beginning in the late 1990's, a series of judicial opinions began to emerge, which have undermined the purpose and effect of the ADA. Among other things, the Supreme Court has ruled, in direct contravention of congressional intent, that the ADA must be strictly interpreted to create a "demanding standard for qualifying as disabled." The court has also ruled that mitigating measures—including medications, prosthetics, hearing aids, and other auxiliary devices, must be considered in determining whether an individual has a disability under the ADA.[2] The Court, in reaching this decision, had the nerve to state that it "had no reason to consider the ADA's legislative history." In so doing, the court has significantly narrowed the scope of conditions that were specifically intended to be covered by the act, including epilepsy, diabetes, HIV infection, depression, cancer, and intellectual and developmental disabilities, bipolar disorder, multiple sclerosis, hard of hearing, visual impairments, post-traumatic stress disorder, heart disease, depression, and asthma.[3]

The Supreme Court's rulings have created an untenable situation for individuals who are taking self-help steps to control their illnesses or mitigate the effects of their impairments. If they avail themselves of treatment that improves their condition and prolongs their health and life, they are no longer "covered" by the protections of the ADA, and cannot challenge discriminatory treatment under the act. These opinions, and their progeny, create a bizarre legal scenario in which an employer can refuse to hire or terminate an individual *expressly because of their disability*, and then—when challenged—argue that the individual is not "*disabled enough*" to fall within the protections of the ADA. Thus, while the employer's practices may be overtly discriminatory on the front end, those practices cannot be challenged "on the back end" under the ADA. If this sounds confusing to you—or nonsensical—that's because it is. My friends, we are truly "through the looking glass" here.

I'd like to take a moment and give you a few examples of how this confounding reasoning has worked against people with disabilities. I'll start by telling you a bit about the case of a young man named Charles Irvin Littleton, Jr. Mr. Littleton is a 29-year-old man with intellectual disabilities. He lives at home with his mother and receives social security benefits because of his disability. In 2003, Charles' job counselor helped him to arrange an interview for a position as a cart-pusher at a large, well-known retail establishment. Charles' job counselor, Carolyn Agee, asked in advance if she could sit in on the interview with Charles, and the personnel manager agreed. When Ms. Agee and Mr. Littleton arrived at the store, however, Ms. Agee was not permitted to attend the interview. After the interview, the company refused to hire Charles.

Charles brought a discrimination claim against the company under the ADA. The court never reached the question, however, as to whether Charles was qualified for the job or whether the company had discriminated against him on the basis of his disability. Rather, the court extinguished the matter before ever reaching these substantive questions by finding, in accordance with the company's arguments, that Charles was not "disabled" under the ADA. The court made this finding despite Charles' explanations that (1) his cognitive ability was equal to that of an 8-year-old child, (2) he needed a job counselor to accompany him during the interview process and at the workplace itself, until he became comfortable with his job responsibil-

---

[1] 56 Fed. Reg. 51,145 (Oct. 10, 1991).

[2] Consortium for Citizens with Disabilities, Failing to Fulfill the ADA's Promise and Intent: The Work of The Courts in Narrowing Protection Against Discrimination on the Basis of Disability (Sept. 2006) (unpublished manuscript, on file with author), citing *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy* v. *United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).

[3] Consortium for Citizens with Disabilities, Failing to Fulfill the ADA's Promise and Intent: The Work of The Courts in Narrowing Protection Against Discrimination on the Basis of Disability (Sept. 2006) (unpublished manuscript, on file with author).

ities, (3) that he had "difficulty thinking and communicating," which the court itself had observed in the delivery of his testimony, (4) that he was substantially limited in the ability to communicate with others as a result of his disability, and (5) that he was substantially limited in the major life activity of working, as demonstrated by his receipt of social security disability benefits, which are granted only to those who are unable to work by virtue of significant impairments in ability.

Despite these arguments, the court found that, because Charles could drive a car, had graduated from high school with a special education certificate, and had attended a technical college and was able to read and comprehend, he was not substantially limited in the major life activities of thinking and learning. The court also found that although Charles was not hired for this particular position, there were other jobs that he could do, and therefore that his disability did not substantially limit him in the major life activity of working. In other words, while Charles' disability may have been the catalyst for the denial of employment by this company, he was not disabled enough to be protected from discriminatory hiring practices under the ADA.[4]

Let me share with you the story of Mary Ann Pimental. Mary Ann was a registered nurse who lived in New Hampshire with her husband and two children. She worked in a hospital. After 5 years of employment at the hospital, Mary Ann was promoted to the nurse management team. About 1 year later, she was diagnosed with Stage III breast cancer.

Mary Ann took some time away from work to undergo a mastectomy, chemotherapy, and radiation treatments. While she was receiving her treatment, the hospital eliminated Mary Ann's position. When she was well enough to return to work, Mary Ann re-applied for several different positions at the hospital, but was not hired. Eventually, the hospital hired her back as a staff nurse for only 20 hours per week, without the higher level of benefits accorded to those working more than 30 hours per week.

Given her strong performance history, and the fact that she had been asked by her employer about her ability to perform her nursing duties while being treated for cancer, Mary Ann believed that the hospital's decision to hire her back in a part time, diminished capacity was related to her breast cancer. When Mary Ann challenged the hospital's decision under the ADA, the hospital argued that Mary Ann did not have a disability, and hence was not protected by the ADA. In response, Mary Ann offered highly personal evidence and information to her employer that demonstrated how her breast cancer had substantially impacted her life. She noted her hospitalization for mastectomy, chemotherapy, and radiation therapy; she shared that she had problems concentrating, memory loss, extreme fatigue, and shortness of breath; that she experienced premature menopause brought on by chemotherapy, burns from radiation therapy, pain in her shoulder resulting in an inability to lift her arm above her head, sleep deprivation caused by nightmares, difficulty in intimate relations with her husband as a result of her premature menopause and self-consciousness about her mastectomy, and that she needed assistance from her husband and mother in caring for herself and her two children, because of extreme fatigue and difficulties performing basic household tasks.

When Mary Ann returned to work, she was still receiving radiation treatment and experiencing great fatigue. She could not lift her arm above her head, experienced concentration and memory problems, and still received help with household and childcare tasks. Despite this painful litany, the hospital maintained that Mary Ann did not have a disability under the ADA because she hadn't shown a substantial limitation of a major life activity, and the court agreed. It wrote:

> "[while] [t]here is no question that plaintiff's cancer has dramatically affected her life, and that the associated impairment has been real and extraordinarily difficult for her and her family, Mary Ann failed to show that she had been limited by breast cancer on a permanent or long-term basis." [5]

Mary Ann Pimental died of breast cancer 4 months after the court issued its decision.

The stories of Charles Littleton and Mary Ann Pimental are but two examples—two tragic, confounding examples—of the misconstruction of the intentions of this body and the contravention of the broad sweep of the ADA. In these cases, and others like them, the courts and the employers *never reach* the substantive question

---

[4] Consortium for Citizens with Disabilities, The Effect of the Supreme Court's Decisions on Americans with Disabilities (unpublished manuscript, on file with author), citing *Littleton* v. *Wal-Mart Stores, Inc.*, No. 05–12770, 2007 WL 1379986 (11th Cir. May 11, 2007).

[5] Consortium for Citizens with Disabilities, The Effect of the Supreme Court's Decisions on Americans with Disabilities (unpublished manuscript, on file with author), citing *Pimental* v. *Dartmouth-Hitchcock Clinic*, 236 F.Supp.2d 177, 184, 188 (D.NH. 2002).

under the ADA—the question of whether the employer's action was improperly related to the individual's disability. That inquiry is circumvented—it ends before it begins—with the narrow construction of "disability," and a finding that individuals who are clearly disabled, who are entitled to the protections of the ADA, and whom the ADA was intended to protect—are not sufficiently disabled to warrant its protections. *And there are many more stories*: Stephen Orr was fired from his job as a pharmacist after his employer refused to allow him to take a lunch break so that he could regulate his blood sugar and control his diabetes by eating. But because Stephen managed his diabetes through regimented food intake and medication, the court ruled that he was not substantially limited in any major life activity, and therefore was not protected from discrimination under the ADA.[6] Vanessa Turpin was an auto packaging machine operator with epilepsy, who resigned after her employer required that she work a shift that would have worsened her seizures. The court held that although Vanessa experienced nighttime seizures characterized by "shaking, kicking, salivating, and, on at least one occasion, bedwetting" and that caused her to wake with bruises on her arms and legs, Vanessa was not disabled because "[m]any individuals fail to receive a full night of sleep." The court also found that Vanessa's daytime seizures, which caused her to become unaware and unresponsive to her surroundings and to suffer memory loss, did not render her disabled because "many other adults in the general population suffer from a few incidents of forgetfulness a week." [7]

These cases are painful to recount. And unfortunately, there are many more. The Supreme Court has set the standard—a standard that is in direct opposition to the intent of this body—and the lower courts have followed, creating a barrage of incorrectly reasoned opinions that un-do and negate the good that this body expressly endeavored to achieve.

Recent studies show that plaintiffs lose more than 90 percent of cases brought under the ADA, primarily on the grounds that they are not disabled enough.[8] Thus, the courts never reach the question of discrimination under the ADA, and these matters are dismissed on the basis that the complainant does not qualify as "disabled" under the Supreme Court's narrow and strict definition. These cases affirm the dire necessity of this gathering, and the necessity of further action to clarify—so that there can be no further mistakes by employers or the courts—that these individuals are covered and protected by the ADA.

If our voices were not heard clearly in 1990, let them be heard again—forcefully and unequivocally—so that there will be no mistake as to our intentions; and no mistake that individuals like Charles Littleton and Mary Ann Pimental and Stephen Orr and Vanessa Turpin are entitled to the full and complete protection of this legislation.

Let me be clear—we do not seek to govern the *outcome* of these cases—we do not argue today that each of the complainants in the [number] cases would have prevailed in their discrimination claims. We simply state that where an individual alleges discrimination on the basis of disability his or her claim should at least be heard and decided—should rise or fall—*on its merits as intended by Congress. The ADA promises no less.*

IV. EMPLOYMENT STATISTICS

While some employers clearly seek loopholes in the ADA and try to avoid compliance with its terms, it is important to note that there are others that have embraced the ADA, and have taken a proactive approach to developing inclusive, accessible workplaces. These employers include, among others, IBM, Merrill Lynch, CVS, Hewlett-Packard, JP Morgan Chase, SunTrust and Lockheed. Let these companies be the proud vanguard for other businesses to follow. And *follow they must*; for despite this great legislation, and the courageous work of so many, there is still much that is unchanged. Despite the passage of the ADA over 17 years ago, and despite its effort to prevent discrimination on the basis of their disability in gaining employment, statistics indicate that little has changed in terms of the numbers of people

---

[6] Consortium for Citizens with Disabilities, Failing to Fulfill the ADA's Promise and Intent: The Work of The Courts in Narrowing Protection Against Discrimination on the Basis of Disability (Sept. 2006) (unpublished manuscript, on file with author), citing *Orr* v. *Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

[7] Consortium for Citizens with Disabilities, Failing to Fulfill the ADA's Promise and Intent: The Work of The Courts in Narrowing Protection Against Discrimination on the Basis of Disability (Sept. 2006) (unpublished manuscript, on file with author), citing *Equal Employment Opportunity Comm'n* v. *Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).

[8] Congressman Steny Hoyer, *Not Exactly What We Intended, Justice O'Connor, www.washingtonpost.com*, Jan. 20, 2002.

with disabilities entering the job market. According to some statistics, the employment rate for people with disabilities has remained in the vicinity of 35 percent since World War II.[9] Nearly ⅔ of people with disabilities are unemployed. Since 1995, the employment rate for women who are not disabled has been 80.06 percent, for women with disabilities the employment rate is 33.06 percent. Since 1995, the employment rate for men who are not disabled has been 94.96 percent, and for men with disabilities the employment rate is 36.21 percent. For college graduates (male and female) without disabilities, the employment rate is 89.9 percent. For college graduates with disabilities, the employment rate is 50.6 percent. The median household income for women with disabilities has been $13,974; for disabled men, the median household income has been $15,275.[10]

These numbers—which infer an unemployment rate for people with disabilities of roughly 65 percent, are alarming. The large employment *gap* between people with disabilities and those without disabilities—a gap of roughly 50 percent—is alarming. These numbers tell us that, although this legislation is "on the books," so to speak, and has been "on the books" for 17 years—there is a disconnect that is inhibiting the fulfillment of the promise of the ADA, and that is preventing the removal of barriers to full participation in the mainstream job market.

What is the source of this disconnect, we must ask. Apart from the recent case law history, which sends a message to employers that they can "get around" the ADA with the right manipulation or maneuvering, research has shown that changing hearts and minds is a difficult task when it comes to creating and catalyzing change. Employers in at least one study stated that the most difficult adjustment to make in order to meet the needs of an employee with a disability was "changing co-worker/supervisor attitudes." According to this study, changing attitudes was rated as "difficult" more than twice as often as other adjustments, such as "changes to management system," and 16 times as often as "ensuring equal pay and benefits" for employees with disabilities.[11]

No change or growth or evolution is *ever* without difficulty, however. Legislation is the first, critical step forward on this journey. But words alone, without employer action and enforcement, can only take us so far in achieving true integration, in changing attitudes and hearts and minds. Employers must not only "talk the talk" with appropriately worded anti-discrimination policies, but must also "walk the walk," so to speak, by working in partnership with the principles of the ADA, educating their employees—from the top down—and making their workplaces accessible to disabled employees. They must create and maintain a corporate culture of inclusion, fairness, and respect for diversity in thoughts and ideas. And they must realize that this is *not* an act of charity.

According to surveys conducted by the DuPont Corporation and other companies, employees with disabilities have lower turnover rates, lower absenteeism, and high productivity. Successive studies by DuPont showed, consistently, that 90 percent of employees with disabilities were considered average or better than average in job performance.[12] And there is talent out there to perform jobs at *all levels* of enterprise—from senior executives with disabilities to mid-level employees to entry-level candidates. The National Business Services Alliance has a new Disability Employment Institute, which, among other things, offers CEO and manager training courses to people with disabilities. Programs like these are critically important in helping to integrate the employment sector at every level and maintaining a strong American workforce. By 2010, it is estimated that America will have 168 million jobs and only 158 million workers to perform these jobs. "Tapping" the pool of willing, capable, and talented workers with disabilities could be our national solution to that impending shortage.

Moreover, creating inclusive, accessible workplaces goes a long way in creating good will with the community of people with disabilities—a community that is now approximately 54 million strong in the United States alone. This is a powerful consumer base, and a base that is continually growing. There are 76 million people over the age of 50 in this country, and by 2020 this number will have grown to 116 million, or 36 percent of the population. As the baby boomers grow older, and as they seek both to remain in the workforce longer and to patronize businesses that meet their growing physical, information and communication accessibility needs, this progressive and powerful generation will continue to influence the way companies do business, both internally and externally.

---

[9] Center for an Accessible Society, Labor Day and People with Disabilities, *available at http://www.accessiblesociety.org/topics/economics-employment/labor2001.htm.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

To put it simply—accessible and inclusive workplaces are not only the law, not only an ethical imperative, but they are also sound business practice. In creating and pursuing integrated hiring practices and accessible environments for employees with disabilities, employer-businesses can tap an under-utilized segment of the work force as well as a significant, but often overlooked, consumer base. And perhaps most important, we must remember that integrating the workforce, expanding our worlds, and encouraging policies and practices that foster the potential of all employees—those with disabilities and those without—is good for everyone.

V. VETERANS ISSUES/THE FUTURE/ CONVENTION/CLOSING

I will begin my closing remarks by recalling that, in 1990, Senator Harkin dedicated the ADA to the "next generation." Esteemed colleagues, Senators, Congressmen and Congresswomen, that generation is here. They are our children and our grandchildren; our brothers and sisters. They are born with disabilities, they acquire disabilities through illness or accident, they age into disabilities. And it goes without saying that they are also the wounded sons and daughters of the conflicts in Iraq and Afghanistan. Recent estimates state that more than 20,000 men and women have been wounded in these military operations.[13] Iraq veterans have seen twice the number of amputations as veterans of previous wars, and some of these soldiers have lost more than one limb.[14] Young men and women are returning home with significant injuries in unprecedented numbers, as the quality of care in the field enables them to survive what might in earlier wars have been fatal injuries. Many servicemen and women—a recent report suggested approximately 6 percent—are returning with mental health problems, and more than half from Iraq/Afghanistan conflict are returning with what many are calling the "signature wound" of the Iraq war—traumatic brain injury.[15]

These men and women—and all those who live with a disability of any kind or source—need our attention and our continued vigilance and commitment in seeing to it that this legislation serves its intended purpose, and that all of our children have the opportunity to live strong, productive lives and pursue their dreams to the greatest extent of their will and desire. Seventeen years later, it is not yet time to rest. It is time, instead, to strengthen, renew and restore our energy and our commitment to *restore* the rights and promises of the Americans with Disabilities Act of 1990.

We here have made a promise to all the members of this new generation. It is a promise that must be kept, not just in word, but in deed. We have promised them the opportunity for good, rich, productive lives; we have promised them education, inclusion in the workforce, *the financial ability to raise families*. For wounded veterans and others—many of them parents—this means being able to resume their place as an economic contributor within their families. We must see to it that discrimination on the basis of disability does not mean an end of life or productivity, that our sons and daughters in military service do not return to a country in which they have no place. We had better learned these painful lessons from the Vietnam War. We must see to it that individuals are not shut out of the mainstream workforce because of discrimination on the basis of disability. For unless this trend changes, they—we—will be kept in a cycle of poverty, personal dependence, and economic dependence on government subsidies, which serves to undermine dreams and to waste human potential. Let us affirm today that we will not allow that, that the door to the past is forever closed.

And finally, let us commit, today, to re-taking our place of leadership upon the world stage. In August 2006, a United Nations general assembly panel passed the U.N. Convention on the Rights of Persons with Disabilities, by the full U.N. General Assembly in December 2006, a treaty intended to expand the freedoms of 650 million people with disabilities, worldwide. The treaty, which is expected to take effect in 2008 or 2009, with the 20th member nation formally ratifying it, requires countries to guarantee freedom from exploitation and abuse, and protects against discrimination in all areas. It addresses access to the full range of human rights—civil, political, economic, social, and cultural, and focuses particular attention on the treatment of women and children with disabilities. Some of the primary principles set forth in the treaty include: (1) the equal right to life for people with disabilities;

---

[13] Intrepid Fallen Heroes Fund, Facts and Statistics (2007), *available at www.fallenheroesfund.org/common/page.php?ref=fund__statistics*.

[14] *Amputation Rate for U.S. Troops Twice That of Past Wars,* The Boston Globe (Dec. 9, 2004), *available at www.boston.com/news/mnation/articles/2004/12/09/amputation__rate__for__us__troops*.

[15] Gregg Zoroya, *Key Iraq Wound: Brain Trauma,* USA Today (March 3, 2005), *available at www.usatoday.com/news/nation/2005–03–03-brain-trauma-lede__x.htm*.

(2) equal rights for women and girls with disabilities; (3) an end to enforced institutionalization; (4) the right to equal participation in the job market; and (5) removal of barriers to accessibility in the areas of transportation, public facilities, and communications, including the Internet.

On March 30, 2007, the treaty opened for signature and ratification. More than 100 Member States and the European Community signed the Treaty, with Jamaica being the first country to go beyond endorsement to ratification. [To date, the United States has not signed this Treaty.] Let us see to it that this does not remain the case, and that America is not left behind. Let today's gathering, and the passage of the ADA Restoration Act, signal to the world that America is re-claiming her rightful place as a leader among nations, and re-committing herself to this cause—the cause of human rights, of equal opportunity and dignity for all of its citizens, and for those around the world.

I thank you all for your time and attention.

Senator HARKIN. John, thank you again for a very provocative statement. Very provocative. And as I've said before, your high intellect is only matched by your passion on this issue. And I thank you very much for so many years, being in the forefront of this fight. Thank you again, really, I think for encapsulating what the real issue is.

Dick Thornburgh, what can I say? I just welcome you back again, and all of you here who may not have been around in the 1980s, this is one of our real unsung heroes of the ADA. I can remember the meetings we had here, trying to work things out—legislation is always just tough. And working them out, I remember then-Attorney General Thornburgh as being the voice of reason, bringing people together, to work out these differences, smooth them over and make sure we had legislation we could pass. And I always remember that, and ever since then, you've always been a strong, strong advocate for people with disabilities.

I thank you for being here today, Attorney General Thornburgh.

STATEMENT OF DICK THORNBURGH, COUNSEL, KIRKPATRICK & LOCKHART, PRESTON, GATES, ELLIS, LLP, WASHINGTON, DC.

Mr. THORNBURGH. Thank you, Senator, I too, am pleased to be here before you today, to testify about the need for consideration and passage of the ADA Restoration Act, S. 1881.

When I served as Attorney General under George H.W. Bush, one of my proudest achievements was indeed working on the passage of the ADA. As parents of a child with physical and intellectual disability, both my wife and I fully understand the importance of the ADA to 54 million Americans with disabilities and their families.

The ADA, which sets as its goals, equality of opportunity, full participation, independent living and economic self-sufficiency for people with disabilities, is one of the most significant pieces of civil rights legislation in the past 25 years, and has changed the lives of millions of Americans with disabilities.

On occasions like this, I always have in my mind, that glorious sun-filled day, July 26, 1990, on the South lawn of the White House, when President Bush signed into law the Americans with Disabilities Act. None of the 3,000 or so persons with and without disabilities, present for the event, will ever forget the excitement of that day as this bill of rights for millions of Americans became the law of the land.

Make no mistake about it, as you've pointed out, the passage of the ADA 17 years ago, was the result of strong bipartisan work. I was personally involved in these negotiations in my role as Attorney General. The Bush administration and the Congress, both the Senate and the House, Republicans and Democrats, as well as the business community and the disability community worked together to get this important legislation passed.

It took the personal involvement of many individuals too numerous to mention: C. Boyden Gray, Sam Skinner, President Bush, Senators Dole, Hatch, yourself, Senator Kennedy, and an equal number of committed members of the House. We all worked together with one goal in mind—to break down the barriers to people with disabilities, and to open the social and economic door to the mainstream of American life. The passage of the Americans with Disabilities Act was truly a cooperative effort.

Today, I remain proud of the tremendous strides we have made in the empowerment of people with disabilities since the enactment of this important legislation.

Many more people with disabilities have greater opportunities than ever before. We see greater numbers of children and adults with disabilities around us, partaking of the diverse benefits our society has to offer. We can feel the impact of improved accessibility. Moreover, the Americans with Disabilities Act has become a beacon and a model for disability policy reform throughout the world.

Yet, despite the substantial progress, ADA has not been as effective as intended in protecting some individuals with disabilities from employment discrimination. The problem is a direct result of judicial interpretation or misinterpretation of the definition of who qualifies as an individual with disability under the statute.

Under the three 1999 U.S. Supreme Court decisions in Sutton, Murphy and Kirkingburg cases, as well as a series of a lower court decision, the definition of who qualifies as an individual with disability has become unduly restrictive and often difficult to prove. So that millions of Americans we all intended to protect from discrimination, including people with intellectual and developmental disabilities, bi-polar disorder, multiple sclerosis, epilepsy and diabetes are no longer covered by the law's protection. I don't think there are any among us who think that these conditions do not qualify as disabilities. Yet, this is what the courts have, in effect, concluded, over and over again since 1999, and what now needs to be rectified by the Congress.

The problem we face now is actually worst than that. In many instances, these individuals are caught in a bizarre and unintended Catch–22. Let me give you an example, citing from the brief of the Department of Justice in *Murphy* v. *United Parcel Service*, filed in the U.S. Supreme Court in 1999.

They used this example.

> "An employee that develops a serious and chronic medical condition that can be effectively controlled only by taking oral medication several times a day. In many employment situations, giving an employee a brief break so the employee could take the medication would be a reasonable accommodation."

Yet, under the Court of Appeals theory in that case, which is the U.S. Supreme Court's theory, the employer could refuse that accommodation, because the employee, by virtue of his medication, ceases to be disabled, and is therefore not entitled to the protections of the ADA.

Clearly, this is not what was intended by those of us who worked together cooperatively in the years leading up to the ADA passage in 1990. In fact, it's quite the opposite. As Senator Harkin has noted, the definition of disability under the ADA is taken from the definition of handicapped individual, contained in the Rehabilitation Act of 1973.

When we were looking for an appropriate definition, I remember thinking that we should go with something familiar, and that had worked well, and that was the reason we turned to the definition of disability under the Rehabilitation Act.

Prior to the enactment of the ADA, courts had interpreted the term "handicapped individual" under the Rehabilitation Act broadly, to include people with a wide variety of physical and mental impairments, which were recognized as disabilities, even where a mitigating measure—like the medication mentioned, or a hearing aid—might lessen the impact on the individual. In most cases, defendants and the courts, accepted that a plaintiff was a member of the protected class as a handicapped individual, and moved onto the merits of the case, examining, for example, whether the plaintiff was qualified to perform the job, or whether a reasonable accommodation might cause an undue burden on the employer.

In addition to favorable treatment by the lower courts, the U.S. Supreme Court had also endorsed a broad interpretation to the definition of handicapped individual, before Congress decided to adopt this model for the definition of disability in the ADA.

The repetition of this definition in the ADA, thus, was clearly meant to incorporate the Rehabilitation Act's administrative and judicial interpretations that had worked well to provide anti-discrimination protection to people with disabilities.

Just to be sure, the legislative language, as noted, went even further, and included a specific statutory provision requiring courts to interpret the ADA to provide as much protection as the Rehabilitation Act, and its implementing regulations.

Yet, despite consensus at the time between the Administration, Congress, Republicans, Democrats, the disability community and the business community, about the desired result, our best efforts did not achieve the intended result, nor the result that all of us had expected.

Supreme Court decisions in Sutton, Murphy, Kirkingburg, as well as in *Toyota* v. *Williams*, have effectively eliminated the ADA protection for many people with disabilities, particularly in the workplace.

Those who have been excluded from the protections of the ADA are individuals whom we explicitly intended to protect under the statute. About this there can be no question that specific language in the House and Senate committee reports bears that out.

The goal then, as now, was to ensure that all Americans with disabilities have the opportunity to participate in all aspects of American society. For many people with disabilities, a job or a ca-

reer represents the optimum link to the American dream. The idea that an employee with a disability is entitled to a reasonable accommodation at work is not a controversial concept. Most people with disabilities just want an opportunity to work, and to earn a paycheck, just like the rest of us.

To be totally realistic, we must recognize that the ADA Restoration Act is no silver bullet when it comes to increasing job opportunities for people with disabilities. Many more individuals must be empowered through education and job training programs so that they can use their gifts and talents in the workplace. And more employers will have to take a proactive approach to hiring people with disabilities.

Our goal must be to see that people are protected in the workplace against discrimination, because of impairments, irrespective of whether or not they are able to use mitigating measures to become maximally productive.

Nonetheless, I believe that it is time for Congress to restore the balance and original intent, and the protections for individuals with disabilities under this important civil rights statute that all of us worked so hard to put into place 17 years ago by taking action and passing the ADA Restoration Act.

Thank you very much, Senator.

[The prepared statement of Mr. Thornburgh follows:]

PREPARED STATEMENT OF DICK THORNBURGH

Thank you for that kind introduction. My name is Dick Thornburgh and I am currently counsel to the national law firm of Kirkpatrick & Lockhart Preston Gates Ellis LLP, resident in their Washington, DC. office. I am the former Attorney General of the United States and the former Governor of Pennsylvania. It is an honor to be here before you today to testify about the need for immediate consideration and passage of the ADA Restoration Act, S. 1881.

When I served as Attorney General of the United States under President George H.W. Bush, one of my proudest achievements was working on passage of the ADA. As parents of a child with a disability, both my wife and I fully understand the importance of the ADA to the 54 million Americans with disabilities and their families. The ADA—which sets as its goals equality of opportunity, full participation, independent living, and economic self-sufficiency for people with disabilities—is one of the most significant pieces of civil rights legislation in the past 25 years, and has changed the lives of millions of Americans with disabilities.

On occasions like this, I always have in my mind that glorious, sun-filled day, July 26, 1990, on the South Lawn of the White House, when President George H.W. Bush signed into law the Americans with Disabilities Act. None of the 3,000 or so persons, with and without disabilities, present for the event will ever will forget the excitement of that day, as this bill of rights for millions of Americans became the law of the land.

Make no mistake about it—the passage of the ADA 17 years ago was the result of strong, bipartisan work. I was personally involved in these negotiations in my role as Attorney General of the United State during the Bush Administration. Together, the Bush Administration and Congress—both the Senate and the House, Republicans and Democrats—as well as the business community and the disability community—worked together to get this important civil rights legislation passed. It took the personal investment of many individuals too numerous to mention—Boyden Gray, Samuel Skinner, President George H.W. Bush—as well as Senators Dole, Hatch, Harkin, and Kennedy and an equal number of committed members of the House. All of us worked together with one goal in mind—to break down the barriers to people with disabilities, and to open the social and economic door to the mainstream of American life. The passage of the Americans with Disabilities Act of 1990 was truly a cooperative effort.

Today I remain proud of the tremendous strides we have made in the empowerment of people with disabilities since the enactment of this important civil rights legislation. Many more people with disabilities have greater opportunities than ever

before. We see greater numbers of children and adults with disabilities around us, partaking of the diverse benefits our society has to offer. We can feel the impact of improved accessibility. Moreover, the Americans with Disabilities Act has become a beacon and a model for disability policy reform throughout the world.

Yet despite this substantial progress, the ADA has not been as effective as intended in protecting some individuals with disabilities from employment discrimination. This problem is the direct result of judicial interpretation—or misinterpretation—of the definition of who qualifies as an "individual with a disability" under the statute. Under the three 1999 Supreme Court decisions in *Sutton, Murphy and Kirkingburg*, as well as a series of lower court decisions, the definition of who qualifies as an "individual with a disability" has become so restrictive, and difficult to prove, that millions of people we all intended to protect from discrimination—including people with intellectual and developmental disabilities, bipolar disorder, multiple sclerosis, epilepsy, and diabetes—are no longer covered by the law's protections. I don't think there are any among us who think that these conditions do not qualify as disabilities. Yet this is what the courts have concluded over and over again since 1999, and what now needs to be fixed by Congress.

And the problem that we now face is actually worse than that. In many instances these individuals are caught in a bizarre and unintended Catch–22. If they are taking their medication or using other measures to mitigate the impact of their disability, they risk that a court will no longer consider them to have an impairment that "substantially impacts one or more major life activities" and will conclude that they are not "disabled" and thus not entitled to the reasonable accommodation and antidiscrimination protections of the statute—even if their symptoms would return as soon as their medication stopped. It is absurd to imagine that whether an individual is entitled to a reasonable accommodation—such as modifying a work schedule or having access to a communications device—should be judged in inverse proportion to their efforts to manage the symptoms of their disability.

Clearly this is not what was intended by those who worked together cooperatively in the years leading up to ADA passage in 1990. In fact, it is quite the opposite.

The definition of disability under the ADA is taken from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973. When we were looking for an appropriate definition, I remember thinking that we should go with something familiar and that had worked well; and thus we turned to the definition of disability under the Rehabilitation Act. Prior to enactment of the ADA, courts had interpreted the term "handicapped individual" under the Rehabilitation Act broadly to include people with a wide variety of physical and mental impairments, including (for example) epilepsy, diabetes, multiple sclerosis, hearing and vision impairments, cerebral palsy, heart disease, and intellectual and developmental disabilities. These impairments were recognized as disabilities even where a mitigating measure—like medication or a hearing aid—might lessen their impact on the individual. In most cases, defendants and the courts accepted that a plaintiff was a member of the protected class ("handicapped individual") and moved on to the merits of the case, examining, for example, whether the plaintiff was qualified to perform the job, or whether a reasonable accommodation might cause an undue burden on the employer.

In addition to favorable treatment by the lower courts, the Supreme Court had also endorsed a "broad" interpretation of the definition of "handicapped individual" before Congress decided to adopt this model for the definition of disability in the ADA, as in the case of *School Board of Nassau County* v. *Arline.*

The repetition of this definition in the ADA thus was meant to incorporate the Rehabilitation Act's administrative and judicial interpretations that had worked well to provide antidiscrimination protection to people with disabilities. Just to be sure, the legislative language went even further and included a specific statutory provision requiring courts to interpret the ADA to provide at least as much protection as the Rehabilitation Act and its implementing regulations:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by the Federal agencies pursuant to such title. 42 U.S.C. § 12201(a).

Yet, despite consensus at the time between the Administration, Congress, Republicans, Democrats, the disability community, and the business community about the desired result, our best efforts did not achieve the intended result, nor the result that all of us had expected. The Supreme Court's decisions in *Sutton, Murphy, Kirkingburg*, as well as in *Toyota* v. *Williams*, have effectively eliminated the ADA protections for many people with disabilities, particularly in the workplace. Those who have been excluded from the protections of the ADA are individuals whom we

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00022 Fmt 6633 Sfmt 6621 S:\DOCS\39388.TXT DENISE

explicitly intended to protect under the statute. About this there can be no question—the specific language in the House and Senate Committee Reports bears that out.

The goal then, as now, was to ensure that all Americans with disabilities have the opportunity to participate in all aspects of American society. For many people with disabilities, a job or a career represents the optimum link to the American dream. The idea that an employee with a disability is entitled to a reasonable accommodation at work is not a controversial concept. Most people with disabilities just want an opportunity to work and to earn a paycheck, just like everyone else.

I believe that it is time for Congress to restore the original intent and protections for individuals with disabilities under this important civil rights statute that all of us worked so hard to put into place 17 years ago by taking action and passing S. 1881, the ADA Restoration Act.

Senator HARKIN. Thank you, General, and thank you again for all of your work through all these years. Thanks for that powerful statement, I've made some notes here on it.

Next we turn to Steven Orr, a licensed pharmacist from Rapid City, SD. As I said, he experienced discrimination based upon his diabetes, was found not to be protected under the ADA, and is here today to share a story with the committee.

Steven has two sons and a daughter, likes to ride his motorcycle—I question that, but—travel and spend time with his family. I used to ride a motorcycle, but I was a lot younger than you are, I'll tell you that.

[Laughter.]

Steven has also volunteered for the American Diabetes Association.

Mr. Orr, welcome, please proceed.

STATEMENT OF STEVEN ORR, PHARMACIST, RAPID CITY, SD

Mr. ORR. Thank you. Good afternoon, my name is Steven Orr, I'm a licensed pharmacist from Rapid City, SD.

Thank you for the opportunity to speak, I would like to provide some highlights from my written testimony.

I have lived with Type I diabetes since 1986, and take excellent care of my health. Today, I use an insulin pump. I must administer insulin multiple times each day.

I must administer this insulin to treat my condition, as recommended by my doctors in maintaining tight glucose control. This is incredibly important, it helps prevent the serious long- and short-term consequences of diabetes, including heart disease, amputation, blindness and death.

In 1997, I was invited to apply for a position as manager of a Wal-Mart pharmacy in Chadron, NE. It was a great opportunity, I had lived there previously, and my children and family are still there.

I never imagined that my diabetes could lead to me being fired from a job, however, that is exactly what happened. When I was hired by Wal-Mart, my diabetes management regimen included three insulin injections daily, and meal breaks to prevent me from suffering from dangerously low blood glucoses, or high hypoglycemia.

Severe hypoglycemia can cause seizure, unconsciousness or even death.

Prior to being hired, I disclosed to my District Manager that I had diabetes and that I would need a regularly-scheduled, uninterrupted half hour lunch break to check my blood glucose and to eat.

Because I was going to be the only pharmacist, my manager agreed to close the pharmacy while I took my lunch break.

The pharmacy opened in January 1998. The first 6 weeks went very well. Then the regional management changed, and I was told that I could no longer close the pharmacy for my lunch. I tried to accommodate the store's request, but I was unable to do so and safely manage my diabetes. My glucose levels plummeted.

For example, one day I had a blood glucose reading of 41 mg per deciliter. A healthy level ranges between 80 and 120. I was unable to eat until after 2 p.m.. As soon as I went to the snack bar, I was paged back to the pharmacy.

This was not a one-time occurrence, and for the next 3 months, I experienced repeated dangerous low levels on the job, including a blood glucose level of 32.

I told my supervisor how unhealthy it was for me to continue skipping lunch, but he refused to allow me a routine, daily half hour lunch break.

Finally, to protect my health, I returned to taking lunches. On May 12 I was fired. Let it be clear, when I was fired, it was told flat out, it was because I had diabetes.

After this discrimination, I sued Wal-Mart for violating my rights under the ADA, however, the U.S. District Court ruled against me, and the U.S. Court of Appeals rejected my appeal, because of the U.S. Supreme Court's decision narrowing the law, I was not considered disabled under the act for the sole reason that my diabetes is under such good control.

Amazingly, the Court ignored the fact that when I was working at Wal-Mart, I was prevented from properly managing my diabetes condition by my employer, my case was dismissed, and I never had a chance to prove that, with a very small, reasonable accommodation, I could both perform my job and protect my health.

Ironically, Wal-Mart now allows the pharmacy to close for lunch.

I also know my request was reasonable, because every other employer I have ever had—including my present employment—has been able to accommodate my need for a lunch break, and I've been able to fully perform all of my duties and successfully manage my diabetes.

It's not right that the same employer that fired me because of my diabetes, could then claim that I did not meet the definition of disability under the ADA.

I'm before you today to say that even with proper diabetes management, this disease affects me every day, every hour of my life. I must constantly try my hardest to maintain a balance between dangerously high and dangerously low blood glucose levels. The good news is that I have largely been successful in keeping myself safe and healthy. Yet it was because I worked so hard to manage my diabetes to make myself a productive employee and citizen, that the court found that I didn't merit the protection from discrimination.

Again, thank you for the opportunity to speak today. Thank you.

[The prepared statement of Mr. Orr follows:]

PREPARED STATEMENT OF STEPHEN C. ORR, R.PH.

Mr. Chairman and members of the committee, good morning. My name is Stephen Orr and I am a licensed pharmacist from Rapid City, SD. Thank you for the opportunity to testify before the committee today. It is a pleasure to be here speaking to you, Chairman Harkin, Senator Enzi and the other distinguished members of this committee. I appreciate you holding this hearing on restoring the Americans with Disabilities Act (ADA) and for providing me with the opportunity to tell my story of discrimination.

I have lived with type 1 diabetes since 1986 and take excellent care of my health. Having type 1 diabetes means that I must administer insulin multiple times each day in order to survive. As a pharmacist, I provide others with information about how to manage their diabetes throughout the day—and I take that advice very seriously: treating my condition as recommended by my doctors and maintaining tight blood glucose control.

I'd like to explain a little about diabetes so that you know what I mean by "tight blood glucose control." Diabetes is a condition in which the pancreas either does not create any insulin, which is type 1 diabetes, or the body doesn't create enough insulin and/or cells are resistant to insulin, which is type 2 diabetes. Insulin is a hormone that allows glucose or sugar to move from the blood stream into the cells where it is used for energy. Thus, untreated diabetes results in too much glucose in the blood stream. High blood glucose levels, known as hyperglycemia, can be very dangerous in the short-term and, in the long-term, it is high blood glucose levels that lead to the many long-term complications of diabetes including blindness, heart disease, kidney disease, and amputation. Thus, I administer insulin to myself in order to lower my blood glucose level. However, while a normal pancreas is able to secrete just the right amount of insulin, it is much harder for a person with diabetes to maintain blood glucose level in a safe range. If I end up with too little insulin in my system I will have hyperglycemia. But, if I end up with too much insulin in my system I will experience a condition call hypoglycemia. Hypoglycemia occurs when blood glucose falls below 70 mg/dL. Low blood glucose levels can be caused by skipping or delaying a meal, more exercise or physical activity than usual, too much insulin, or not following your schedule for taking your insulin or diabetes pills. Mild or moderate hypoglycemia is pretty common for children and adults who take insulin but hypoglycemia can turn severe—leading to seizure or unconsciousness—in very little time. Severe hypoglycemia is a life-threatening condition.

In short, hypoglycemia and hyperglycemia are conditions that happen when insulin and blood glucose are out of balance. In order to manage my diabetes I need to carefully monitor my blood glucose level by self-administering a blood test numerous times a day and adjusting the amount of insulin I administer to take into account the food I eat, the exercise I get, and other factors such as illness. The reason I strive for tight blood glucose control is that research has established that is the way to avoid the devastating long-term complications of diabetes.

In 1997, a Wal-Mart district manager invited me to apply for a position as manager of the company's pharmacy in Chadron, NE. It sounded like a great opportunity. At the time, I was working as a pharmacist in Rapid City, SD, but had lived in Chadron previously and looked forward to moving the 110 miles back to the town where my children resided and countless other family and friends still lived. The job had a great salary and, as I was 47 years old, I expected to retire from there.

Having lived with diabetes for so long, I never imagined that my diabetes could lead to my getting fired. However, that is exactly what happened. In essence I lost my job as a result of trying to protect my health and safety even though none of that interfered with me being a good pharmacist.

At the time that I was hired by Wal-Mart, my diabetes management regimen included, among other things, three insulin injections daily, as well as half-hour lunch breaks to prevent me from suffering from hypoglycemia. Prior to being hired, I disclosed to my district manager that I had diabetes and that I would need to have a regularly scheduled, uninterrupted, lunch break to check my blood glucose level and eat. I only accepted the position after my new employer agreed to the terms by which I could take the care necessary to manage my condition. Based upon this agreement, I accepted the position and moved to Chadron.

On January 3, 1998, I began training in the Rapid City Wal-Mart Pharmacy. By the end of the month, we held the Grand Opening of the Chadron Wal-Mart Supercenter, and the in-store pharmacy formally opened. As the only pharmacist at this location, taking a lunch meant closing the pharmacy during that time period—one of the initially agreed upon terms for my employment. However, a mere 6 weeks after I started work, the regional management changed. I was told by a new district manager that I could not close for lunch breaks. I was instructed that I should eat

behind the pharmacy if and when things slowed down. I tried to comply with the request, but was unable to do so and safely manage my diabetes. My blood glucose readings plummeted. For example, on March 12, 1998, I had a blood glucose reading of 41 mg/dL. On this particular day, I was unable to eat until after 2 p.m. When I walked over to the snack bar to pick up lunch I was paged back to the pharmacy. Unfortunately, this was not a one time occurrence and for the next 3 months I experienced repeated dangerously low hypoglycemia on the job, including a blood glucose level of 32 mg/dL on May 6, 1998.

I spoke to my supervisor in order to explain how unhealthy it would be for me to continue the practice of skipping lunch, but he refused to consider accommodating my medical condition. In order to protect my safety, I was forced to return to my practice of taking half-hour lunches and on May 12, 1998, I was discharged. Let me be clear: when I was fired, I was told flat out that it was because I had diabetes.

After the discrimination I experienced, I brought a case against Wal-Mart Stores, Inc. for violating my rights under the Americans with Disabilities Act. However, the U.S. District Court granted summary judgment against me and the U.S. Court of Appeals rejected my appeal. The appeals court said that because of Supreme Court decisions narrowing the Federal law, I was not considered "disabled" under the act—for the sole reason that my diabetes is under such good control. The appeals court agreed with my testimony that when my blood glucose level is not within a safe range I suffer from a variety of immediate complications including vision impairment, low energy, lack of concentration and mental awareness, lack of physical strength and coordination, slurred speech, difficulties typing and reading, and slowed performance. Yet, the court said that I could not rely on evidence of how I was when my blood glucose level was not within a safe range. Rather, the court said:

> [N]either the district court nor we can consider what would or could occur if Orr failed to treat his diabetes or how his diabetes might develop in the future. Rather, [the Supreme Court decision in] *Sutton* [v. *United Airlines*] requires that we examine Orr's present condition with reference to the mitigating measure taken, i.e., insulin injections and diet, and the actual consequences which followed.[1]

Amazingly, the court ignored the fact that when I was working at Wal-Mart, I was prevented from properly managing my condition by my employer. That is, Wal-Mart took away the means I had to manage my disease, I became ill, and then my case was thrown out of court because the judges insisted upon viewing me as I would be if I had been allowed to properly manage my disease.

My case was dismissed and I never had a chance to try to prove that, with a very small reasonable accommodation, I would have been able to both fully perform my job and protect my health and safety. Ironically, as a corporate policy, Wal-Mart is now allowing the pharmacy in Chadron to be closed for a 30-minute period, although there is still only one pharmacist on duty.

I find it tremendously unfair that the same employer that fired me because of my diabetes could then successfully claim that I did not meet the definition of disability under the ADA. I ask that you amend the law so that the focus of cases like mine is on whether the individual can do the job, rather than lawsuits about the private details of an individual's medical condition. I stand before you to say that, even with proper diabetes management, this disease affects me every day, every hour of my life. I must constantly try my hardest to maintain a balance between dangerously high and dangerously low blood glucose levels. Diabetes affects everything I do from eating to physical activity. The good news is that I have largely been successful in keeping myself safe and healthy. Yet, it was because I work so hard to manage my diabetes to make myself a productive employee and citizen that the court found that I didn't merit protection from discrimination.

I wish my case was unique but it is not. Too many people have had their ADA claims dismissed because they were found by the courts not to be sufficiently disabled under the courts' misguided interpretation of the definition of disability under the ADA. Congress must restore the ADA to what it was intended to be—a comprehensive mandate to protect all Americans from discrimination based on disability.

Again, thank you for the opportunity to speak before you today.

Senator HARKIN. I'm sorry, thank you Mr. Orr for, again, bringing a real life case here, I'll have more to ask you about that when

[1] *Orr* v. *Wal-Mart Stores*, 297 F.3d 720, 724 (8th Cir. 2002).

we get into questions, but I appreciate your coming this great distance.

Camille Olson, partner in the law firm of Seyfarth & Shaw, LLP, a national firm with the largest Labor & Employment practices in the United States.

Ms. Olson quoted a book entitled, Labor and Employment Law: The Employer's Compliance Guide, that was in 2006. Most recently in 2006, Ms. Olson participated on behalf of employer groups and ADA shareholder meetings, focusing on analyzing the impact of various aspects of the ADA since its enactment.

Ms. Olson, welcome to the committee, and please proceed.

STATEMENT OF CAMILLE OLSON, ATTORNEY, SEYFARTH & SHAW, CHICAGO, IL

Ms. OLSON. Thank you, Senator Harkin, good afternoon.

Senator Harkin, and other members of the committee, my name is Camille Olson. In addition to the background you just described, I also regularly teach employment discrimination at Loyola University School of Law in Chicago, IL, which is my hometown.

My legal practice is focused on equal employment opportunities to clients from employers. Working with employers every day on ADA compliance demonstrates some of the successes that have been achieved as a result of the passage of the ADA.

Employers have completely revised their applications, their prehire processes, implemented job descriptions, they've also modified jobs as well as workplace infrastructures, and developed policy statements, as well as ruled out training for all of its employees to ensure individuals in the workplace understand the rights of individuals with disabilities.

Yet, I would have to say that one of the most important changes brought about by the Americans with Disabilities Act is the impact on the way employers think. Today, employers do not focus on how the job is done, instead employers focus on what the job requires, a change in the workplace that was entirely driven by the Americans with Disabilities Act.

When employers do not comply with the act, there's been a record—which I have cited in my written testimony as presented to the committee, of both the enforcement of the rights of the individuals with disabilities before the Equal Employment Opportunity Commission, as well as through court proceedings.

I strongly support equal employment opportunity in employment. However, S. 1881 goes far beyond clarifying the original intent and language of the ADA. Instead, it would expand the ADA in three ways; first, by removing the current ADA requirement that a disability, "substantially limits a major life activity,"; second, by prohibiting consideration of mitigating measures; and, third, by shifting the burden of proof from employees to employers as to whether an individual is qualified to perform the essential functions of a job. I will address each of these three concerns.

First, in attempting to clarify the ADA, S. 1881 defines all individuals with any mental or physical impairment, as disabled. Regardless of whether any of those impairments are functionally limiting to the individual. S. 1881 limits all impairments, and labels

them all as per se disabilities, repeating the wrong that the ADA was originally designed to eliminate.

An impairment must also substantially limit the person in one or more major life activities to be considered a disability. That's true under the Rehabilitation Act, it's true under the EEOC regs, and it's been true throughout all of the court proceedings with respect to all disability rights with legislation.

Courts have consistently held that where an impairment such as diabetes, such as mental retardation, such as epilepsy, does substantially limit major life activities, that a plaintiff is covered under the ADA.

The same thing is true under the Rehabilitation Act. The court, under each of those acts, have also held that individuals with those exact same impairments did not meet the definition of disability, under the ADA and under the Rehabilitation Act, because showing that you have a mental or physical impairment is only one part of the definition of a disability, under any of those disability rights statutes.

What would be the practical effect of defining an ADA disability as an impairment? It is telling that no one has provided this committee with a list of conditions that would not be covered under S. 1881. I ask you to consider, what impairment would be excluded? Employers will find themselves addressing accommodation requests from individuals with the flu, with poison ivy, ankle sprains, stomach aches, the occasional headache, a toothache, and a myriad of other minor medical conditions that go far beyond any reasonable concept of disability. There is no limitation on the definition of disability under S. 1881, and as a result, it should not be adopted as the new definition of disability under the ADA.

Second, prohibiting employers from considering mitigating measures, and both their positive and negative effect in determining whether someone that has a disability, will label the vast majority of us sitting in this room today, and the vast majority of us in America, as disabled under the ADA.

The clearest example that can be given pertains to eyesight. All of us who wear glasses or contact lenses would be covered. The plain language of the ADA, as well as its functional approach, are inconsistent with this interpretation.

Third, S. 1881 shifting the burden of proof to the employers demonstrates that an individual alleging discrimination, "is not a qualified individual with a disability," while the facts lie with the plaintiff. And this shift is inconsistent with the balance of the rights and obligations between disabled employees and their employers.

The ADA imposes certain affirmative obligations on lawyers. Those obligations result in preferences that only people with disabilities are entitled to receive. It would be unfair and impracticable to circumscribe employers from inquiries regarding medical conditions, as the law currently does, and at the same time to impose on employers the burden of proving that a plaintiff is not a qualified individual under the ADA, as S. 1881 would do.

S. 1881's reversal of Congress' allocation of the burden of proof also contravenes the fundamental tenants of law, that disfavors proof of a negative proposition.

In conclusion, Congress, the courts and the EEOC have all recognized the imperatives of an individualized inquiry into the impact of an impairment on each individual in determining coverage under the ADA, as well as other disability statutes.

In contrast, S. 1881 would label all people with a particular condition as disabled, irrespective of whether the condition even impairs—let alone substantially limits—any major life activities.

For these reasons, and other reasons that are contained in my submitted written testimony, I express serious concern with S. 1881's definition of disability and it's shift of the burden of proof to employers.

Mr. Chairman, and members of the committee, I thank you for this opportunity to share some of those concerns with you today.

[The prepared statement of Ms. Olson follows:]

PREPARED STATEMENT OF CAMILLE A. OLSON

Good afternoon, Mr. Chairman and members of the committee. My name is Camille A. Olson, and I am pleased to present this testimony addressing S. 1881, the Americans with Disabilities Act Restoration Act of 2007 ("S. 1881"). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with nine offices and has one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth Shaw attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.[1]

I am chairperson of Seyfarth Shaw's Labor and Employment Department's Complex Discrimination Litigation Practice Group. I have practiced in the areas of employment discrimination counseling and litigation defense for over 20 years at Seyfarth Shaw's home office in Chicago, IL. Our firm has been actively involved in the legislative and regulatory process surrounding the Americans with Disabilities Act[2] since its passage in 1990. Members of our firm, along with our training subsidiary, Seyfarth Shaw at Work, have also written treatises on the ADA; advised thousands of employers on complying with the ADA; trained tens of thousands of managers and employees on the requirements of the ADA; and actively conducted employer audits and developed workplace best practices under the ADA.

My personal legal practice is focused on equal employment opportunity compliance—counseling employers as to their legal obligations under the ADA, developing best practices in the workplace, training managers and supervisors on the legal obligations they have under the ADA, and litigating ADA and other employment discrimination cases. I also regularly teach employment discrimination at Loyola University School of Law in Chicago, IL. I am a frequent lecturer and have published numerous articles and chapters on various employment and discrimination issues. For example, in 2006 I co-edited a book entitled *Labor and Employment Law: The Employer's Compliance Guide* for Thompson Publishing Group. I am also a member of the U.S. Chamber of Commerce's policy advisory committee on equal employment opportunity matters, and I am a member of the Board of Directors of a number of business and charitable institutions. Most recently, in 2006 I participated, on behalf of employer groups, in ADA shareholder meetings focused on analyzing the impact of various aspects of the ADA since the ADA's enactment.

Today, I have been invited to discuss with you the meaning and impact of the Americans with Disabilities Act Restoration Act of 2007 (S. 1881). There can be no question that sponsors of S. 1881 have proposed changes to the ADA with the intent of benefiting individuals with disabilities. S. 1881's proposed changes, however would unquestionably expand ADA coverage to encompass almost any physical or mental impairment—no matter how minor or short-lived. In essence, S. 1881 changes the focus of the ADA from whether an individual has a functional "disability" to whether the individual has an "impairment," without regard to whether the impairment or ailment in any way limits the individual's daily life. Indeed,

[1] I would like to acknowledge Seyfarth Shaw attorneys William P. Schurgin, Condon A. McGlothlen, Anne E. Duprey, Annette Tyman, Kyle R. Hartman, Laura E. Reasons, Jonathan J.C. Grey, and law clerk Katherine Mendez for their invaluable assistance in the preparation of this testimony.

[2] Pub. L. No. 101–336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (1994); 47 U.S.C. § 225711 (2001)).

under the proposed definition, almost anything less than perfect health would be a disability under the ADA.

While I strongly support equal opportunities in employment and, in particular, the inclusion of individuals with disabilities in the workplace, I respectfully submit that, if enacted, S. 1881, as currently drafted, would go far beyond clarifying the original intent and language of the ADA. While I recognize that many current members of this committee were among the original sponsors of the ADA, and I cannot deny the frustration which some of you have expressed over certain interpretations of the statute, I urge you to look carefully at the language of S. 1881, because I do not believe that it is the best course of action.

Instead of clarifying the ADA, S. 1881 would expand the ADA by (1) removing the current ADA requirement that a disability "substantially limit a major life activity;" (2) prohibiting consideration of mitigating measures that an individual may be using, such as medication or devices, when determining whether the individual has a disability; and (3) shifting the burden of proof from employees to employers as to whether an individual is "qualified" to perform the essential functions of a job.

When we were initially involved in the legislative and regulatory process surrounding the ADA in the late 1980s and early 1990s, no Federal statute provided comprehensive protection to individuals with disabilities. Congress's focus then was on Americans with disabilities who had been shut out of the workplace—persons who were substantially limited in major life activities such as their ability to hear, see, walk, speak, eat, perform manual tasks, and/or care for one's self. When we spoke of individuals with disabilities at that time, many of us focused on the millions of individuals who were deaf or hard of hearing, blind, or who were significantly limited in their mobility.

Ironically, from 1993 to the present, the average number of ADA charges filed with the EEOC by individuals who are deaf or hearing impaired consistently represent only 3 percent of all ADA claims filed.[3] Instead, the most common ADA claim filed relates to back conditions, representing close to 13 percent of all ADA claims, which are often the result of workplace injuries that are otherwise covered by workers' compensation laws.[4] Indeed, individuals with conditions such as cancer, diabetes, and epilepsy combined have historically accounted for less than 10 percent of all ADA charges filed.[5] Moreover, these historical percentages have remained *unchanged* following the Supreme Court decisions that have given rise to today's proposed legislation.[6]

Our experience in working with employers every day on ADA compliance in their workplaces demonstrates some of the successes that have been achieved as a result of the passage of the ADA. Employers have completely revised their application and pre-hire processes to ensure that individuals with disabilities fully participate in the opportunities available for open positions. Employers have made significant modifications to jobs and aspects of workplace infrastructure to ensure that all employees have access to the same terms and conditions and benefits of employment. Employers have developed policy statements and implemented training programs in their workplaces to sensitize fellow employees and their managers to the rights of individuals with disabilities. Employers have regularly engaged in the interactive process with employees and medical professionals, as well as the Job Accommodation Network, and other accommodation resources, to ensure that they are providing appropriate reasonable accommodations to individuals with disabilities.

Yet, one of the most important changes brought about by the ADA is its impact on the way employers think. Today, employers focus on not "how" the job is done, but instead on "what" the job requires. Most employers large and small now have job descriptions describing essential job functions, and they use those as objective hiring guides—a change in the hiring landscape driven entirely by the ADA. And, when employers do not comply with the obligations of the ADA, there has been a

---

[3] EEOC.gov, ADA Charge Data by Impairments/Bases—Receipts *http://www.eeoc.gov/stats/ada-receipts.html* (last visited Nov. 13, 2007).

[4] *Id.* (*see*, especially, Intake Averages for Non-Paralytic Orthopedic Impairment and Orthopedic and Structural Impairments of the Back).

[5] *Id.*

[6] *Id.*

record of enforcement of the rights of individuals with disabilities before the EEOC [7] and in court proceedings.[8]

In attempting to clarify the ADA, S. 1881 engages in precisely the wrongful conduct that the law was intended to prevent.[9] In defining all impaired individuals as disabled, S. 1881 labels as "disabled" all individuals with impairments of any sort or degree—regardless of whether those impairments are functionally limiting. Congress expressly repudiated this approach in 1990:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual abilities of such individuals to participate in, and contribute to, society; . . .[10]

In effect, S. 1881 engrafts the "regarded as" definition into the first prong of the statutory definition of who is "disabled" under the act. Put another way, Congress would be "regarding as" disabled, individuals with non-disabling impairments. In a misguided attempt to advance the rights of persons with disabilities, the law would incorporate the stereotypic assumptions that it has taken our Nation years to advance above and beyond. By defining disability to mean "impairment," S. 1881 makes all impairments per se disabilities, thus repeating the wrongs the ADA was originally designed to eliminate.

Moving the ADA's focus away from individuals with disabilities to individuals with impairments, as S. 1881 would do, will give virtually every employee the right to claim reasonable accommodation for some impairment, no matter how minor, unless the employer can prove that doing so would be an undue hardship. Employers will find themselves addressing potential accommodation requests from individuals with high cholesterol, back and knee strains, colds, the flu, poison ivy, sprained ankles, stomach aches, the occasional headache, a toothache, and a myriad of other minor medical conditions that go far beyond any reasonable concept of disability.

Similarly, prohibiting employers from considering mitigating measures in determining whether someone has a disability will, in effect, make almost every individual someone who has a disability under the ADA. The clearest example pertains to eyesight. Without question, the ability to see is a major life activity. By requiring that we evaluate whether someone has a sight impairment without regard to mitigating measures means that anyone who wears glasses, contact lenses, has had laser surgery, or at any time in their life did not have 20/20 uncorrected eyesight, will be considered a person with a disability under the ADA.

Finally, the ADA, like all other civil rights legislation relating to employment, currently requires the plaintiff to prove that he or she was qualified for the job at issue. S. 1881 would instead require employers, who are generally prohibited from

---

[7] For example, from July 26, 1992, through September 30, 2006, the EEOC reports that 235,465 charges were filed by individuals claiming violations of their rights under the ADA. Each year, since 1992, the EEOC has resolved charges that have provided monetary benefits totaling approximately $44,000,000 per year to charging parties, for a total of $622,600,000 in monetary benefits throughout this time period. These monies do *not* include monetary benefits obtained by individuals or the EEOC through litigation in court. EEOC.gov, ADA Charges FY 1997–FY 2006, *http://www.eeoc.gov/stats/ada-charges.html* (last visited Nov. 13, 2007).

[8] Courts have enforced significant monetary awards and entered injunctions to ensure ADA compliance where employers were found not to comply with existing ADA obligations. *See, e.g., E.E.O.C.* v. *Tommy Bahama Group*, No. 2:06–CV–01406–RSM (Empl. Discrim. Verdicts & Settlements) (BNA) (W.D. Wash. June 4, 2007) (consent decree enjoining employer from further ADA violations and requiring notices, training, and other relief); *E.E.O.C.* v. *AmSan LLC*, No. 2–06CV–260–J (Empl. Discrim. Verdicts & Settlements) (BNA) (N.D. Tex. May 23, 2007) (enjoining employer from engaging in ADA violations); *Harding* v. *Cinbro Corp*., No. 04–158–B–W (D. Me. August 22, 2006) (Empl. Discrim. Verdicts & Settlements) (BNA) (jury verdict in favor of employee who was terminated shortly after disclosing his medical condition to his employer); *E.E.O.C.* v. *EchoStar Commc'ns Corp*., No. 02–CV–00581 (Empl. Discrim. Verdicts & Settlements) (BNA) (D. Colo. May 6, 2005) (jury verdict in favor of blind applicant for failure to provide reasonable accommodation); *Brady* v. *Wal-Mart Stores Inc*., No. 03–CV–3834 (E.D.N.Y. February 23, 2005) (Empl. Discrim. Verdicts & Settlements) (BNA) (jury verdict in favor of disabled worker for violations under ADA and NY State Human Rights Law); *Zolnick* v. *Graphic Packaging Corp*., No. 00–CV–1800 (Empl. Discrim. Verdicts & Settlements) (BNA) (D. Colo., September 24, 2004) (jury verdict in favor of a disabled worker who was not allowed to return to work following recovery from brain aneurysm); *Young* v. *DaimlerChrysler*, No. IP–01–299–C–M/S (Empl. Discrim. Verdicts & Settlements) (BNA) (S.D. Ind. June 21, 2004) (jury verdict in favor of disabled worker denied transfer that would have accommodated her severely injured right arm).

[9] 42 U.S.C. § 1201 (a)(5)(7).

[10] 42 U.S.C. § 1201 (a)(7) (emphasis added).

inquiring into an employee's medical condition under the ADA, to bear this burden of proof, while the facts lie with the plaintiff.

For these reasons, and all of the reasons set forth below, I oppose the Americans with Disabilities Act Restoration Act of 2007, as drafted, and urge the committee to carefully review the issues raised in this statement as it considers S. 1881.

THE ADA'S ORIGINAL PURPOSE AND LANGUAGE

On July 26, 1990, the ADA was enacted into law with the stated purpose of providing a "clear and comprehensive national mandate" to eliminate discrimination against individuals with disabilities.[11] Title I, the employment title of the ADA, has been considered the "most comprehensive piece of disability civil rights legislation ever enacted and the most important piece of civil rights legislation since the 1964 Civil Rights Act."[12] In enacting the ADA, Congress expressly found, and included in the ADA's statutory language, that "some 43,000,000 Americans have one or more physical or mental disabilities. . . ."[13] Congress further found that individuals with disabilities were left with no legal recourse to counter the historical segregation and isolation that relegated the disabled to an inferior status in society.[14] Thus, the ADA's overarching goal was to bring into the fold of mainstream society[15] a "discrete and insular minority" of disabled individuals who had been "subjected to a history of purposeful unequal treatment."[16] Congress's findings, quoted above, are expressly incorporated into the ADA itself.

The final version of the ADA was enacted into law following a period of considerable debate, negotiation, and compromise between Congress and President George H.W. Bush's administration.[17] In the spirit of such compromise, the enacted law "recognize[d] the civil rights of persons with disabilities as well as the economic restraints of businesses and other entities covered by the Act."[18] While signing the ADA into law, President George H.W. Bush explained to America's business community the careful balance of opportunities and obligations reflected in the new law:

> You have in your hands the key to the success of this act, for you can unlock a splendid resource of untapped human potential that, when freed, will enrich us all. I know there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the U.S. Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred.[19]

The ADA defines an individual with a disability as someone who either: (1) has a physical or mental impairment that substantially limits that person in one or more major life activity; or (2) has a record of such physical or mental impairment; or (3) is regarded as having such a physical or mental impairment.[20] This definition of disability was adopted by Congress from Section 504 of the Rehabilitation Act of 1973, the statutory predecessor to the ADA that covered employers with Federal contracts and/or those receiving Federal financial assistance.[21]

Under both the ADA and Rehabilitation Act, the definition of a *physical or mental impairment* has *always* been defined very broadly.[22] Similarly, the EEOC's ADA regulations define physical and mental impairments as:

---

[11] Title I relates to private and public sector employment. Title II relates to State and local governments. Title III relates to places of public accommodation. Title IV relates to telecommunications and common carriers. Pub. L. No. 101–336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (1994); 47 U.S.C. § 225711 (2001)).

[12] Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 Lab. Law. 1 (1991); *see also* 1 Henry Perritt, Jr., *Americans with Disabilities Act Handbook § 1.01 at 3.*

[13] 42 U.S.C. § 12101(a)(1).

[14] 42 U.S.C. § 12101(a)(2)–(5).

[15] Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), *http://www.eeoc.gov/ada/bushspeech.html* (last visited Nov. 13, 2007).

[16] 42 U.S.C. § 12101(a)(7).

[17] 1 Perritt, Jr., *Americans with Disabilities Act Handbook*, § 2.02 at 19; *The Americans with Disabilities Act: A Practical and Legal Guide to Impact Enforcement and Compliance*, Bureau of National Affairs, Inc. at 35–62 (1990).

[18] Mayerson, 7 Lab. Law. 1, 6 (1991).

[19] Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), *http://www.eeoc.gov/ada/bushspeech.html* (last visited Nov. 13, 2007).

[20] 42 U.S.C. § 12101(2).

[21] Rehabilitation Act of 1973, Pub. L. No. 93–112, *amended by* Pub. L. No. 93–516, 88 Stat. 1617 (1974) (codified at 29 U.S.C. § 701 *et seq.*)

[22] 29 CFR pt. 1630, App. § 1630.2(h) (2006).

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting . . . neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin and endocrine: or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.[23]

The language of the EEOC regulations mirrors that used in various ADA committee reports as descriptive of physical or mental impairments under the ADA.[24] The EEOC regulations also mirror the 1977 regulations issued by the Department of Health, Education, and Welfare ("HEW") to define physical and mental impairments, and thereby implement Section 504.[25] *Given this broad definition of impairment, almost any physical or mental health condition—no matter how minor, episodic, latent, or temporary—would be covered.* Courts addressing the meaning of impairment have held it to include the following examples of minor conditions: tennis elbow, headaches, high cholesterol, contusions to the knee, back strains, and knee strains.[26] In sum, the definition of physical or mental impairment, under both the Rehabilitation Act and the ADA has been broad, sweeping, and inclusive for over 40 years.

For decades, Congress and the Federal agencies have agreed that a physical or mental impairment is necessary, but not sufficient, to trigger disability law protections. Beyond that, the impairment must also *substantially limit* the person in one or more *major life activity*.[27] The 1977 HEW regulations, committee reports to the ADA, and EEOC regulations all set forth an illustrative list of "major life activities": "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[28]

The ADA's inclusion of "substantially limits one or more of the major life activities of such individual" was the result of deliberate and careful consideration by Congress. In adopting the substantial limitation on a major life activity requirement, Congress (not the Federal judiciary) made clear that covered disabilities do not include "minor, trivial impairments, such as a simple infected finger."[29] Given an increasingly global economy, and the challenges faced by U.S. manufacturers competing with those in China and India, this committee must consider: Is American business better able to bear that burden now, than in 1990?

Whether an impairment substantially limits a major life activity for a particular person requires an individualized, case-by-case assessment of how that person's impairment (or impairments) affects the life of that individual. As even the EEOC has noted, "the determination of whether an individual has a "disability" is not necessarily based on the name of the diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of that individual."[30]

The ADA, like the Rehabilitation Act before it, did not attempt to create a "laundry list" of impairments that are necessarily disabilities, recognizing that some impairment may be disabling for particular individuals but not others, and that new impairments may be discovered in the future.[31] Even short-term impairments can constitute a disability under both the ADA and the Rehabilitation Act, provided that such impairments substantially affect a major life activity. Consistent with Congress's intent, the EEOC's ADA regulations recognize that "[m]any impairments do not impact an individual's life to the degree that they constitute disabling impairments."[32] In sum, the individualized approach to determining "disability" under the ADA, *i.e.*, how a particular impairment affects a particular individual in his or her

---

[23] 29 CFR § 1630.2(h) (2006).

[24] S. Rep. No. 101–16, at 22 (1989); H.R. Rep. No. 101–485, pt. 2 at 51 (1990); H.R. Rep. No. 101–485, pt. 3 at 28 (1990).

[25] *See* 45 CFR § 84.3(j)(2)(1) (2005). Advocates for the ADA have described these regulations as "the best source for understanding the definition of disability under the ADA." Chai R. Feldblum, *The Americans With Disabilities Act Definition of Disability,* 7 Lab. Law. 11, 12–13 (1991).

[26] *See, e.g., Cella* v. *Villanova Univ*., 113 Fed. Appx. 454 (3d Cir. 2004) (tennis elbow); *Sinclair Williams* v. *Stark County Bd. of Comm'rs*, 7 Fed. Appx. 441 (6th Cir. 2001) (headaches); *Benoit* v. *Tech. Mfg. Corp*., 331 F.3d 166 (1st Cir. 2003) (back and knee strains).

[27] 42 U.S.C. § 12102(2)(A).

[28] *See* 45 CFR § 84.3(j)(2)(ii) (2005); Senate Committee on Labor and Human Resources, S. Rep. No. 101–16, 101st Cong., 1st Sess., at 22 (1989); 29 CFR § 1630.2(i).

[29] S. Rep. No. 101–16, at 23 (1990); H.R. Rep. No. 101–485, pt. 2 at 52 (1990).

[30] 29 CFR pt. 1630, App. § 1630.2(j).

[31] *Id.*

[32] *Id.*

major life activities, comports with how the Rehabilitation Act has operated for over 40 years.[33]

As a result, the functional approach to defining disability has resulted in similar impairments producing different determinations as to whether the impairment constituted a disability under the specific facts before the court. This is true, of course, under both the Rehabilitation Act and the ADA. The result naturally flows because two individuals with the same condition may be affected very differently by the condition, and the gravity of the effects of the condition may differ, leaving one individual substantially limited in performing a major life activity, while another individual with the same condition may not have any limitations.

The following determinations under the Rehabilitation Act illustrate this concept. In *Diaz* v. *United States Postal Service*,[34] an employee with chronic back problems was determined not to have a disability under the Rehabilitation Act, because the impairment did not substantially limit major life activities (specifically, manual tasks associated with employment). Whereas, in *Schuett Investment Co.* v. *Anderson*,[35] an individual who suffered a back injury that substantially limited the individual's ability to perform manual tasks was found to have a disability under the Rehabilitation Act. Similarly, courts that have considered whether impaired vision is a disability have focused on the extent of the impairment, as well as the impact of the impairment on the individual in its corrected state. Courts reach different results depending on the facts of the particular case. Thus, in one case it was held that a person who had, at best, combined visual acuity of 20/100 with the use of conventional corrective lenses was determined to have a disability.[36] On the other hand, an individual whose uncorrected vision was below the minimum level set for a police officer, but whose vision was correctable to 20/20, was held not to have a disability.[37] When considering whether cerebral palsy rendered an individual substantially limited in a major life activity, courts have also reached different results depending on the severity of the condition and its impact on the life of the particular individual.[38] Thus, prior to the ADA's passage, under the Rehabilitation Act, the same medical condition, depending on its impact on the individual, led to one individual being covered under the Rehabilitation Act, while another was not.

Under the ADA, courts have applied this individualized, functional approach to the ADA. Thus, depending on the impact of the physical or mental impairment, it may or may not constitute a disability under the ADA. For example, in one case, a school custodian's recurrent depression constituted a disability within the meaning of the ADA because it substantially limited his ability to work and interact with others. In another, a plant worker's long history of depression was not a disability under the ADA because it had very little impact on her ability to work and care for herself.[39] Similarly, individuals with arthritis,[40] bipolar disorders,[41] and epi-

---

[33] The analysis of "who is a handicapped person under the [Rehabilitation] Act is best suited to a 'case by case determination.'" *Rezza* v. *U.S. Dep't of Justice*, No. 87–6732, 1988 WL 48541, at *2 (E.D. Pa. May 16, 1988) *quoting Forrisi* v. *Brown*, 794 F.2d 931, 933 (4th Cir. 1994). "It is the impaired individual who must be examined not just the impairment in the abstract." *E.E. Black, Ltd.* v. *Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980) (determining whether a disability is a qualifying handicap under the Rehabilitation Act requires a case-by-case analysis). Originally, Section 504 of the Rehabilitation Act used the phrase "handicap" rather than "disability"; otherwise, however, the two acts are identical. In 1992, the Rehabilitation Act was amended to make identical the standards for determining violations of the Rehabilitation Act and the ADA.

[34] 658 F. Supp. 484 (E.D. Cal. 1987).

[35] 386 N.W.2d 249 (Minn. App. 1986).

[36] *Sharon* v. *Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986).

[37] *Padilla* v. *Topeka*, 708 P.2d 543 (Kan. 1985) (myopic applicant for police officer position was not handicapped under the Rehabilitation Act).

[38] *Compare Pridemore* v. *Rural Legal Aid Soc.*, 625 F. Supp. 1180 (S.D. Ohio 1985) (individual with cerebral palsy does not have a disability under the Rehabilitation Act when the impairment had little outward manifestation and no apparent substantial limitation on any major life activity); with *Fitzgerald* v. *Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (individual with cerebral palsy and left-side hemipelia was substantially limited in a major life activity under the Rehabilitation Act).

[39] *Compare Anderson* v. *Indep. Sch. Dist*. No. 281, No. 01–560, 2002 WL 31242212 (D. Minn. 2002) (individual with depression considered disabled under the ADA); with *Cooper* v. *Olin Corp.*, 246 F.3d 1083 (8th Cir. 2001) (individual with depression not considered disabled under the ADA).

[40] *Compare Bearshield* v. *John Morrell & Co.*, 570 N.W.2d 915 (Iowa 1997) (individual with degenerative arthritis was not disabled because impairment had little impact on individual's life or ability to function); with *Barnes* v. *Northwest Iowa Health Ctr.*, 238 F. Supp. 2d 1053 (N.D. Iowa 2002) (particular individual's rheumatoid arthritis a disability under ADA).

[41] *Compare Reed* v. *Lepafe Bakeries, Inc.*, 102 F. Supp. 2d 33 (D. Me. 2000), aff'd 244 F.3d 254 (1st Cir. 2001) (individual with bipolar disorder was disabled under the ADA); and *Carrozza*

lepsy[42] may or may not have a disability under the ADA, depending on the nature and extent their particular impairments impact their lives.

Finally, currently under the ADA, a plaintiff bears the burden to prove that he or she is a member of the protected class covered by that statute. The ADA incorporates the procedures of title VII.[43] As a matter of logic and fairness, it has been interpreted as incorporating title VII's standards of proof.[44]

S. 1881 GOES FAR BEYOND THE ADA'S ORIGINAL PURPOSE AND LANGUAGE

When introduced on July 26, 2007, S. 1881 was described as a "modest, reasonable legislative fix . . . so that people who Congress originally intended to be protected from discrimination are covered under the ADA."[45] Instead, Senate Bill 1881 significantly expands the original language and intent of the ADA. It does not merely clarify the ADA, and it does not revise it to reflect Congress's or President George H.W. Bush's original intent underlying its passage in 1990. S. 1881 amends the ADA as described below.

First, S. 1881 expands the ADA's definition of disability by eliminating the requirement that the medical condition substantially impact one of the individual's major life activities. Without this original language, the ADA would deem a physical or mental impairment to be a "*per se* disability" without reference to the medical condition's effect on the person. As such, S. 1881 replaces the ADA's functional approach to defining a disability and replaces it with a *per se* approach that was rejected at the time of the ADA's passage, and that contravenes the definition of disability under the Rehabilitation Act as well.

S. 1881 notes that one of the principal cases that has motivated its sponsors to propose amending the ADA is the Supreme Court's decision in *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*.[46] In Toyota, the question posed to the U.S. Supreme Court was whether the plaintiff's carpal tunnel syndrome and tendonitis were disabilities under the ADA. Importantly, there was no dispute that the plaintiff's carpal tunnel syndrome and tendonitis were physical impairments.[47] The issue before the Supreme Court was whether these impairments substantially limited the major life activity of performing manual tasks. Justice O'Connor, writing for a unanimous court, found that the term "major life activity" "refers to those activities that are of central importance to daily life."[48] The court noted that those impairments that only affect a major life activity in a "minor way" do not rise to the level of a disability. The court emphasized the need for individualized assessment of the effect of the impairment on each individual.[49] Justice O'Connor held that it was insufficient to merely submit a medical diagnosis of impairment; rather, the individual must offer evidence of the impairment's impact on his or her own daily life activities.[50]

The *Toyota* case involved an individual who was injured at work and who alleged that she could not perform a job that required her, as part of a vehicle inspection process, to physically wipe painted car surfaces that were at or above shoulder level

---

v. *Howard County*, No. 94–1593, 1995 WL 8033 (4th Cir. Jan. 10, 1995) (individual with bipolar disorder was disabled under ADA as a major life activity was substantially impacted by this impairment); *with Horwitz* v. *L & J.G. Stickley, Inc.*, 122 F. Supp. 2d 350 (N.D.N.Y. 2000) (individual's bipolar disorder did not constitute disability under ADA).

[42] *Compare Granzow* v. *Eagle Food Ctrs. Inc.*, 27 F. Supp. 2d 1105 (N.D. Ill. 1998) (individual's epilepsy was disability as it substantially limited her various major life activities); *with EEOC* v. *Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) (individual with epilepsy did not present evidence sufficient to establish ADA coverage).

[43] *See* 42 U.S.C. § 12117(a) ("The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.").

[44] *See, e.g., Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 50 n.3 (2003) (stating "[t]he Courts of Appeals have consistently utilized . . . [the McDonnell Douglas burden-shifting] approach when reviewing motions for summary judgment in disparate-treatment cases" and *citing Pugh* v. *Attica*, 259 F.3d 619, 626 (7th Cir. 2001) (applying burden-shifting approach to ADA disparate-treatment claim)). *See also* 42 U.S.C. § 12113(a) (setting forth defenses under the ADA and *not* including defense that plaintiff is *not* a "qualified individual").

[45] Cong. Rec. S10152 (daily ed. July 26, 2007) (statement of Rep. Harkin).

[46] 534 U.S. 184 (2002).

[47] *Id.* at 196.

[48] *Id.* at 187.

[49] *Id.* at 199.

[50] *Id.* at 198.

for significant periods of time.[51] The individual had already been awarded workers' compensation and, without dispute, had previously been accommodated on several occasions by Toyota in various ways to allow her to continue working. While individuals may take issue with the Supreme Court's unanimous ruling, there is an important lesson in the facts of the case.

Simply stated, if Congress enacts S. 1881 it should be prepared for the Federal courts to be inundated with tens of thousands of cases, if not more, filed by workers' compensation attorneys on behalf of individuals with minor work-related injuries that have no long-term or significant impact on their clients' daily life activities.[52] Why would they do so? Because the ADA provides for attorneys' fees and compensatory and punitive damages to successful plaintiffs. From an employment attorney's standpoint, enactment of S. 1881 and the cascade of likely litigation that would follow would be a boon for business. Perhaps the more troubling concern is that these amendments will have the effect of diluting the definition of disability to such an extent that persons who are truly disabled, such as those who are deaf or blind or unable to walk, will find themselves in a long line of plaintiffs.

Similarly, employers would be forced to implement workplace accommodations for people with tennis elbow who may need an arm support, for people with ingrown fingernails who request dictation software to avoid irritating their fingers while typing, to people with sprained ankles who request mobility assistance. With limited resources, employers may be faced with deciding whether to provide sign language interpreters for deaf employees at company meetings or special chairs or other mechanical devices to people with sore backs, tennis elbow, or sprained wrists. These are decisions that employers should not be required to make. Nor do they benefit the people whom the ADA is truly intended to protect.[53]

Who among us doesn't have some physical or mental impairment? Are all of us in this room individuals whom the ADA was intended to protect and bring into the mainstream of society? If so, what will be the impact on those individuals with disabilities that are substantial, who are competing for limited company resources and accommodations with others whose impairments are also covered under S. 1881's definition? Can an employer prefer one employee's request over another because of the perception that the request is "more justified" because of the nature of the "impairment," or because the employee makes the request first (so that the employee who sprained her ankle at the basketball game 2 weeks ago whose doctor has requested that she be provided a handicap parking space gets the space in lieu of a newly-hired employee who uses a wheelchair)?

Proponents of S. 1881 point to a number of cases in which individuals with certain impairments were determined to have a disability under the Rehabilitation Act, while other individuals with similar impairments were determined not to have a disability under the ADA, as support for their position that the ADA must be amended to ensure that all individuals with those impairments are covered by the ADA. As explained below, their analysis does not justify the definition of disability contained in S. 1881, as their analysis is faulty and misplaced, and does not support adopting any "mental or physical impairment" as the definition of disability under the ADA.

Proponents of S. 1881 have argued that individuals with intellectual and developmental disabilities are not covered by the ADA, citing *Littleton* v. *Wal-Mart Stores*.[54] This mischaracterizes the *Littleton* court's holding. The court did not hold that a plaintiff with intellectual and developmental disabilities could not be disabled under the ADA. The plaintiff in *Littleton* claimed that, because of his mental condition, he was substantially impaired in the major life activities of working, learning, thinking, and communicating. However, the plaintiff testified that there were no jobs that he could not perform, that he had graduated from high school and attended a technical college, and that he could read. Further, the plaintiff did not proffer any evidence to show that he was unable to think or communicate. Accordingly, the court held that the plaintiff's mental impairment did not limit any major life activities.

---

[51] *Id.* at 189.

[52] Similarly, the EEOC, given the ADA's charge-filing prerequisite to bringing suit in court, will also be inundated with charges of violations by individuals who would qualify as disabled under S. 1881's definition. With scarce resources, the EEOC would also be forced to spend considerably more time simply administratively managing the many new charges from individuals who have no substantial limitation on a major life activity.

[53] Also, if employers are required to accommodate all of these minor impairments at what point do the sum total of the accommodations become an undue hardship, especially for small businesses?

[54] 231 Fed. Appx. 874 (11th Cir. 2007).

This holding is *not* a blanket denial of coverage for mental disabilities under the ADA, as the proponents of S. 1881 suggest. In fact, courts have consistently held that where a mental condition substantially limits major life activities, a plaintiff is covered under the ADA.[55] Proponents of S. 1881 have similarly mischaracterized the ADA's coverage of individuals with diabetes, noting that diabetics are not covered under the ADA. Again, this blanket statement is without merit. Courts have consistently held that an individual with diabetes is disabled under the ADA where the condition substantially limits a major life function of the individual.[56]

The court in *Nawrot* noted the importance of assessing individuals' physical impairments on a case-by-case basis under the ADA. The court stated that having diabetes was not *per se* dispositive of whether or not someone is disabled under the ADA; the answer to that question depends on the severity of the impairment. The court acknowledged what courts have acknowledged since the passage of the Rehabilitation Act—that individuals with identical mental and physical impairments may or may not be disabled depending on the impact of the condition on their ability to perform major life activities. For example, while analyzing a claim under the Rehabilitation Act, the court in *Elstner* v. *Southwestern Bell Tel. Co.*[57] stated that courts must consider the effects of impairments on individuals. "The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular person a significant barrier to employment."[58] Furthermore, the court in *Forrisi* v. *Bowen*,[59] cautioned against the very outcome that the proponents of S. 1881 are advocating. The court noted that defining a disability cannot be accomplished through "abstract lists and categories of impairments." As the Court of Appeals explained:

> The Rehabilitation Act assures that *truly disabled*, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses, for the particular individual, a more general disadvantage in his or her search for satisfactory employment.[60]

For all of these reasons, we urge the committee to reject S. 1881's definition of disability as defined by any mental or physical impairment of any type.

Second, contrary to S. 1881, mitigating measures should be considered in determining whether an individual has a disability under the ADA. The impact of mitigating measures on the definition of disability under the ADA has been controversial since the ADA's enactment. In *Sutton* v. *United Air Lines*[61] the U.S. Supreme Court held that if a person takes steps "to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially' limited in a 'major life activity.'" Importantly, the Supreme Court's holding emphasizes that both the *positive and negative* effects of any mitigating measures must be taken into account when analyzing a person's potential disability. Accordingly, while the benefits of using medication or an adaptive device are to be considered in determining ADA coverage, so too are any side effects or negative ramifications. While

---

[55] *See E.E.O.C.* v. *Dollar Gen. Corp.*, 252 F. Supp. 2d 277, 284–85 (N.D. N.C. 2003) (holding that mentally retarded plaintiff with a mental impairment that substantially limited one or more of her major life activities was disabled under the ADA); *McAlindin* v. *County of San Diego*, 192 F.3d 1226, 1236 (9th Cir. 1999) (reversing grant of summary judgment, and holding that a genuine issue of material fact existed as to whether plaintiff's anxiety disorder substantially limited a major life activity).

[56] *See Lawson* v. *CSX Transp. Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) ("we have no difficulty in determining that Mr. Lawson's insulin-dependent diabetes . . . [is] a physical impairment under the act" and that it impair[s] major life activities); *Lutz* v. *Glendale Union High Sch., Dist. 205*, 8 Fed. Appx. 720, 722 (9th Cir. 2001) (reversing summary judgment for plaintiff and holding there was a triable issue as to whether plaintiff's diabetes substantially limited major life activity); *Nawrot* v. *CPC Int'l*, 277 F. 3d 896, 905 (7th Cir. 2002) ("we are convinced that Nawrot has sufficiently demonstrated that his diabetes substantially limits his . . . major life activities.").

[57] 659 F. Supp. 1328, 1342 (S.D. Tex. 1987).

[58] *Id.* at 1342.

[59] 794 F.2d 931, 933–34 (4th Cir. 1986).

[60] *Id.* at 931 (emphasis added).

[61] 527 U.S. 471, 482–83 (1999).

subject to criticism, this common sense approach is preferable when considering the alternative.

If the statute were changed to bar consideration of mitigating measures, every person who at any time in his or her life has had uncorrected vision of less than 20/20 would have a disability. All of us who wear glasses or contact lenses would be covered. Individuals who had previously been near-sighted but who had the problem corrected by laser surgery would be covered because they have a history of an impairment. Even individuals who do not need glasses or corrective devices, but whose vision is impaired because they have less then 20/20 uncorrected vision, would be covered.[62] By removing this criteria, S. 1881 would open a "Pandora's Box" of claims by people who do not have a disability under any rational interpretation of that term.

The problems, however, do not end there. If mitigating measures are not to be considered, how would an employer accommodate an individual whose impairment was correctable by medication, such as hearing loss, hay fever, or asthma, but who refused physician recommended medications or devices? Today, courts would find that individual not protected under the ADA.[63] However, under S. 1881, such individuals would clearly be covered. Employers would be forced to accommodate employees whose impairments could be readily corrected by medication, but who choose not to correct them for personal reasons. Similarly, people who choose not to wear glasses for vanity reasons would have to be accommodated.

Today we have heard legitimate concerns and issues relating to individuals with diabetes. Many of us are aware of the decision in *Orr* v. *Wal-Mart Stores*,[64] where Mr. Orr was found not to have a disability because it was determined that his diabetes did not substantially affect a major life activity. In numerous other cases, however, individuals with diabetes have been found to have a disability under the ADA. For example, in *Lawson* v. *CSX Transportation Inc.*,[65] cited by the dissent in *Orr*, the Seventh Circuit Court of Appeals found that the diabetic plaintiff was substantially limited in the major life activity of "eating." The court reasoned that the plaintiff "must always concern himself with the availability of food, the timing of when he eats and the type and quantity of food he eats."[66] The court went on to hold that "[t]he district court failed to consider the extent of the restrictions imposed by Mr. Lawson's treatment regimen and the consequences of noncompliance with that regimen."[67] Ironically, Mr. Orr was precluded by the Eighth Circuit panel, over the objection of dissenting Judge Lay, from raising these issues because he had not pled that he was limited in the major life activity of eating in his original complaint.[68] This is a procedural or evidentiary issue unique to that case, not a problem with the ADA itself.

Other cases are also illustrative. In *Nawrot*,[69] the court found that the plaintiff had demonstrated that his diabetes substantially limited "his ability to think and care for himself," which are both major life activities. In that case, the plaintiff injected himself with insulin approximately three times a day and tested his blood sugar at least 10 times a day.[70] Even taking these mitigating measures into account, which the court noted were themselves a "substantial burden," did not remedy all of the adverse effects of his diabetes.[71] Despite his medication Mr. Nawrot still suffered from "unpredictable hypoglycemic episodes" and during such episodes "his ability to express coherent thoughts [was] significantly impaired."[72] For these and other reasons, Mr. Nawrot was found to be covered under the ADA.[73]

---

[62] Although estimates vary, there are approximately 10 million blind and visually impaired people in the United States. American Foundation for the Blind, Blindness Statistics, *http://www.afb.org/Section.asp?SectionID=15* (last visited Nov. 13, 2007). By contrast, approximately 78 percent of adults in the United States utilize some form of vision correction device: 67 percent wear prescription glasses; 16 percent wear contact lenses; and 10 percent wear nonprescription (*i.e.,* reading) glasses. The Vision Care Institute of Johnson & Johnson Vision Care, Inc., *Americans Are out of Focus on Proper Vision Care*, Sept. 12, 2006, available at *http://www.harrisinteractive.com/news/newsletters/clientnews/2006_JohnsonJohnsonVisionCare.pdf*.

[63] Nancy Lee Jones, *CRS Report for Congress, The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues,* 7 (Congressional Research Service 2007).

[64] 297 F.3d 720, 724 (8th Cir. 2002).

[65] 245 F.3d 916, 923–24 (7th Cir. 2001).

[66] *Id.* at 924.

[67] *Id.*

[68] 297 F.3d at 725.

[69] 277 F.3d 896, 905 (7th Cir. 2002).

[70] *Id.* at 901.

[71] *Id.* at 904.

[72] *Id.* at 905.

[73] *See also, e.g., Rodriguez* v. *ConAgra Grocery Products Co.*, 436 F.3d 468, 480–81 (5th Cir. 2006).

In *Sutton* v. *United Air Lines*, the Supreme Court also cited Congress's finding in the plain language of the ADA (there were approximately 43 million Americans with one or more disabilities) as established that those whose impairments are largely corrected by medication or other devices do not have a disability within the meaning of the ADA.[74] As Justice Ginsburg pointed out in her concurring opinion, the congressional finding that 43 million people had disabilities indicated that such persons "are a discrete and insular minority" that have been "subject to a history of purposeful unequal treatment and relegated to a position of political powerlessness."[75] The Supreme Court further noted that the finding that 43 million Americans had disabilities reinforced the fact that Congress adopted a "functional" instead of a "nonfunctional" approach for the definition of disability.[76] Indeed, the Supreme Court noted that if a "nonfunctional" approach were used, allowing any health condition that impairs health or normal functions of an individual were all that was necessary to establish protection, there would be some "160 million" Americans with disabilities.[77] In short, the Supreme Court recognized the imperative of individualized inquiry into the impact of an impairment on each individual in determining coverage under the ADA. In contrast, S. 1881 would label all people with a particular condition as disabled irrespective of whether the condition even impairs, let alone substantially limits, any major life activity.

Third, in a clear departure from the current statutory scheme, S. 1881 shifts the burden of proof to the employer to demonstrate that an individual alleging discrimination "is not a qualified individual with a disability."[78] Indisputably, the protected class currently covered by the ADA includes "qualified individual[s] with a disability"[79]—disabled individuals who, with or without reasonable accommodation, can perform essential job functions.[80] This inquiry involves two steps: (1) a determination of whether the individual "satisfies the requisite skill, experience, education and other job-related requirements" of the position; and (2) a determination of whether the individual "can perform the essential functions of the position" "with or without accommodation."[81]

The calculated balancing of the rights and obligations between disabled employees and employers is clear from the ADA's legislative history.[82] In accepting the House version of the definition, the Conference Committee rejected a Senate amendment that would have created a presumption favoring the employer's determination of essential functions.[83] In so doing, the Conference Committee noted that the adopted language was "not meant to change the current burden of proof."[84] Thus, the plaintiff continues to bear the burden of proving he or she is "qualified" under the act.[85] As a practical matter, that means employees with disabilities need only prove they are qualified, with or without accommodation, to perform the important parts of their jobs.

Moreover, this compromise is rooted in the statutory scheme which circumscribes an employer's ability to ask an employee whether or not he or she has a disability, or about the "nature or severity of such disability."[86] Plainly, individuals possess and control confidential information about their own health that others do not, and to which others do not have access under the law. For this reason, employees are far better positioned than employers—who lack such information—to demonstrate that they are qualified individuals despite their medical conditions and/or limitations due to such conditions. Simply put, it would be unfair and impracticable to circumscribe employers from inquiries about medical conditions—as the law does—

---

[74] 527 U.S. at 484–86.
[75] *Id.* at 494 (Ginsburg, J., concurring).
[76] *Id.* at 486–87.
[77] *Id.* at 487.
[78] *See* S. 1881 § 7.
[79] *See* 42 U.S.C. § 12112(a).
[80] 42 U.S.C. § 12111(8).
[81] 29 CFR § 1630.2(m).
[82] *See* H.R. Rep. No. 101–485 (1990); S. Rep. No. 101–16 (1989).
[83] H.R. Rep. No. 101–485, at 33 (1990).
[84] *Id.* at 34.
[85] 1 Perritt, Jr., *Americans with Disabilities Act Handbook*, § 3.06 at 115.
[86] 29 CFR § 1630.13. The statute does permit wide-ranging post-offer, pre-employment inquiries and examinations of applicants. 29 CFR § 1630.14. However, employment decisions based on the results of such inquiries or examinations must be "job-related and consistent with business necessity," 29 CFR "1630.14(b), a stringent standard by all accounts. More importantly, as to current employees, Congress limited an employer's ability to ask about medical conditions based on the premise that someone currently performing a job is medically able to do so. *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act* No. 915.002 (2000).

and at the same time impose on employers the burden of proving that a plaintiff is not a qualified individual under the ADA, as S. 1881 would do.

S. 1881's attempted reversal of Congress's allocation of the burden of proof contravenes the fundamental tenet of law disfavoring proof of a negative proposition.[87] Requiring employers to bear the burden in litigation of disproving that an employee is qualified to perform a particular job would lead to a host of practical problems—and absurd litigation results—before and at trial. For example, whether an individual is "qualified" must be determined at the time of the employment action in question. By the time of litigation and/or trial, assuming an employee fails to share certain relevant information with an employer at the time of the challenged action, that critical information may no longer be available, which would unfairly prevent the employer from meeting its burden in litigation.

Significantly, if S. 1881 is enacted, it would not only reverse the ADA and its carefully crafted compromises, but it would also become the only Federal employment discrimination statute to shift the burden on this element—that is, a plaintiff's membership in the protected class—to employers.[88] Although individuals with disabilities are doubtless deserving of protection under Federal law, it seems a disservice to those individuals and members of other protected classes to give the ADA plaintiff in effect "most-favored-nation" status. Proponents of S. 1881 point out that title VII plaintiffs need not prove they are members of a protected class; for example, there is never a dispute that an African-American plaintiff is covered by title VII. But that is because title VII protects everyone, blacks and whites, men and women. Like the Age Discrimination in Employment Act, the ADA is different. As explained previously, it was irrefutably intended to cover a limited universe of Americans. Moreover, unlike virtually all other employment discrimination statutes, the ADA imposes certain affirmative obligations on employers. Those obligations result in preferences that only people with disabilities are entitled to receive.[89]

CONCLUSION

In conclusion, serious concerns exist with respect to the Americans With Disabilities Act Restoration Act of 2007. Mr. Chairman and members of the committee, I thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me if I can be of further assistance in this matter.

Senator HARKIN. Ms. Olson, thank you again very much for being here and I guess I could say, quite frankly, giving the opposing view on the legislation. I'll have more to ask questions about at the end here.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Mr. Chairman. I apologize, I'm going to have another issue that I have to be at in just a few minutes.

If I could just say before I leave, I really want to thank you for having this really critical hearing on the effect of the court decisions, and what we need to be doing. As you know, I grew up in a household with my father in a wheelchair most of my life, he had multiple sclerosis. I so well remember not leaving to go anywhere unless we called to find out what the parking was like, whether there were curbs, how the doors opened, what the bathrooms were

[87] 2 *McCormick on Evidence* 474–75 (Kenneth S. Broun, et al., eds., 6th ed. 2006); *Walker* v. *Carpenter*, 57 S.E. 461 (N.C. 1907) ("The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative.").

[88] *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (Plaintiff bears burden as part of *prima facie* case to show he is a member of the protected class); *Raytheon Co.*, 540 U.S. at 50, n.3.

[89] *U.S. Airways, Inc.* v. *Barnett*, 535 U.S. 391, 397 (2002) ("Yet, the Act, U.S. Airways says, seeks only 'equal' treatment for those with disabilities. . . . While linguistically logical, this argument fails to recognize what the act specifies, namely that preferences will sometimes prove necessary to achieve the act's basic equal opportunity goal. The act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially." (emphasis in original.)

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00040 Fmt 6633 Sfmt 6601 S:\DOCS\39388.TXT DENISE

like whether a table was going to be there, I mean, it literally meant that my dad was housebound so many times.

The ADA made a huge difference in my family's life, and I just know that if my father was still alive today and he was hearing of the challenges of so many people today, he would not want to go back to where we were when I was growing up, so this is really a critical issue.

Let me just point out that, as a member of the Justice Committee, I fought very hard to make sure that we recognize the high number of men and women who are coming home today with mental health problems, Post-Traumatic Stress Syndrome, TBI—I am deeply concerned that unless we do make some changes in this law, that we're going to impact the very men and women who have gone to fight for us, and who are coming home as our warriors, and are going to be impacted by the restrictions of the court decisions. I think that's critical.

I also would say that, as a member—as the Chair of the Transportation Appropriations Committee, I'm deeply concerned, too, about some of the court decisions recently on the Federal Motor Carrier Safety Administration's ability to regulate commercial buses in making sure that people are able to get on buses and that they follow up on what we expect them to do.

I would just like to let you know, despite the fact that I have to leave, I'd like to submit some questions for the record, I want to thank you so much for looking at this, and I just urge all of us to remember that there are a lot of people out there that depend on us to do the right thing, so that they can be, to the fullest extent of themselves, an American who gives something back.

I know that's what my Dad would have wanted, and I really appreciate it.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Mr. Chairman, for calling this hearing to highlight the importance of restoring Congress' intent to protect individuals with disabilities from discrimination.

Far too often, people with disabilities have been faced with unfair obstacles in their workplaces and communities—obstacles that Congress hoped would be overcome by the enactment of the Americans with Disabilities Act 17 years ago.

Unfortunately, recent court decisions have watered-down the protections that Congress intended to provide to these individuals.

My father was disabled for much of his adult life. He had Multiple Sclerosis and was confined to a wheelchair. If my dad was here today—and faced discrimination in the workplace for his disability—he might not be protected under the very law meant to guard his rights because of the recent changes passed down by the courts. That's just not right.

I continue to hear from people in my home State of Washington who are concerned that the rights and protections for people with disabilities are being diminished. They also tell me that too many citizens in our State are suffering because the system meant to empower them to live independent lives is not receiving adequate support.

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00041 Fmt 6633 Sfmt 6601 S:\DOCS\39388.TXT DENISE

They have a right to be concerned. As thousands of wounded warriors return home from Iraq and Afghanistan in need of services, the President vetoed the spending bill that would have funded many of these critical support programs.

For many years, my home State of Washington has provided protection from discrimination to people with disabilities by defining "disability" more broadly than the ADA. Last year, the Supreme Court of Washington threatened this broad protection by adopting the narrow definition of "disability" set forth in the ADA. Fortunately, the Washington State legislature understood that by importing the ADA definition, our State would inherit all of the problems that the ADA's definition has caused. The legislature rejected the ADA language and amended Washington's statutory definition of disability to make it clear that our State protects all people who are discriminated against based on disability.

Washington is a success story, but it is the exception, not the rule. Many more States have adopted the language of the ADA and therefore, provide little or no protection to those who face disability discrimination. The time has come for the ADA to lead and not follow—to make good on its promise of equality to people with disabilities.

Mr. Chairman, today's hearing is about restoring the voice and dignity of those who are discriminated against because of a disability. I look forward to working with my colleagues in this committee and across the isle to restore these protections.

Senator HARKIN. Senator Murray, thank you very much, and thanks for being here, and thanks for being such a great member of this committee, and I look forward to your help as we try to move this legislation through.

Thank you very much.

Now we turn to Professor Chai Feldblum, Professor at Georgetown University Law Center, here. Graduated from Harvard Law School, served with Justice Harry Blackman on the U.S. Supreme Court. I first met Professor Feldblum when she was one of the lead lawyers working with the American Civil Liberties Union on the ADA back in 1989 and 1990. She has written many, many, many articles. I can't say I've read every one, but I've read a lot of them, trying to keep up on the evolving law in this area.

Again, welcome back to the committee.

I didn't say this at the beginning, and I want to make sure it's clear on the record that all of your written statements will be made a part of the record in their entirety.

Please, proceed.

STATEMENT OF PROFESSOR CHAI FELDBLUM, DIRECTOR, FEDERAL LEGISLATION CLINIC AND PROFESSOR OF LAW, GEORGETOWN LAW CENTER, WASHINGTON, DC.

Ms. FELDBLUM. Thank you, and I don't want to have you to read all of those articles, so I'm also hoping to keep this in my 5 minutes here.

Thank you, and I hope to demonstrate in my remarks how the promise of the ADA has, in fact, not been kept, because the courts have not followed congressional intent.

Let me also say, in case someone doesn't care about what your intent was 17 years ago, because as you noted, Senator Harkin, a lot of your colleagues weren't here. I hope to also demonstrate in my remarks that the status quo is simply unacceptable as a matter of sound public policy. Even regardless of intent, one needs to restore the ADA.

First about intent. How has congressional intent been undermined? First, in the case of *Sutton* v. *United Airlines*, which you've heard about, the U.S. Supreme Court decided that a court should take into account mitigating measures in deciding whether someone has an impairment that, "substantially limits a major life activity," even though—as you've heard—every committee report said, do not take mitigating measures into effect.

Now, you've heard a lot about this case, but I want to draw your attention to two sentences in the case. Justice O'Connor, writing for the majority, was responding to the dissent's concern that people with prosthetic limbs, or people who take medicine for epilepsy or high blood pressure, might be excluded based on the rule that the Court was announcing in that case dealing with people wearing eyeglasses.

Here's how Justice O'Connor responded,

> "Individuals who use prosthetic limbs may be mobile and capable of functioning in society, but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment, but nevertheless remain substantially limited."

You know what? Justice O'Connor was exactly right.

If you come back from Iraq with an amputated leg, and you're fitted with a prosthetic limb, like some of the people Senator Murray and you mentioned, but you don't adapt very well to that limb, and you are still substantially limited which, by the way, under current case law means you were severely limited in your ability to walk or run, you'll be covered under the ADA.

If, God forbid, you are lucky enough to adapt well to your prosthetic limb which, thankfully, hundreds of veterans are being able to do, based on developments in technology, and you walk and run just fine, but you are not hired because an employer doesn't want someone with a prosthetic limb in the workplace, you're not covered under the ADA.

Same goes for an impairment that can be treated with medication. If you're unlucky enough to be the person that Ms. Olson quotes in her written testimony, here's the quote, "Despite his medication, Mr. Naras still suffered from unpredictable hypoglycemic episodes," that is, if your medication does not work particularly well, so you're still substantially limited, you will probably pass the first hurdle of the ADA and be considered disabled. And whether, of course, you can then prove that you're qualified for the job is another story, hence one of the Catch–22s.

If the medication for your epilepsy or diabetes or Post-Traumatic Stress Disorder is working well, and you are not substantially limited in any way, but you were fired from a job because of that condition, or more likely, you were not provided an accommodation for that condition, you're out of luck.

Is this a logical way to protect those with disabilities from employment discrimination? I think not.

Here's the second way in which congressional intent was undermined. Under the Rehabilitation Act, a person was covered under the "regarded as" prong of the definition of handicapped, the third prong, if the person could prove that he or she was not hired, or was fired from a particular job because of that impairment. It didn't matter how minor or temporary the impairment was, as long as the person could prove it was the basis for discrimination.

All of the committee reports of the ADA noted that the same coverage would apply under the ADA. In *Sutton*, the U.S. Supreme Court blew a hole in the third prong. It announced a new rule, that to establish coverage under the "regarded as" prong, an individual had to prove, not only that the employer regarded the person as limited in that one job the employer was offering, but also thought that lots of other employers in a broad range of jobs wouldn't hire that person, either. This makes no sense as a matter of sound public policy.

S. 1881 remedies the misinterpretations of the ADA in the *Sutton* case, and the stringent standard for coverage set forth by the Court in a later case by deleting the requirement "substantially limiting major life activity," and extending coverage to those with physical or mental impairments, who experience discrimination based on that impairment.

In conclusion, let me address the concerns raised by Ms. Olson, both in her written testimony and here, that the approach of S. 1881 will undermine the cause of people of disabilities, because the law will no longer cover the "truly disabled" only. Oh my God, all of us might be included.

You know what? This room is filled with people with disabilities who want Congress to pass S. 1881. They don't believe the bill sets back their cause. Why not? Because they understand there is no set of the truly disabled, and then the rest of us. We all exist along a spectrum of abilities. It is true that many of us may never experience discrimination because of our physical or mental impairments, but others of us might.

This is not because some of us are truly disabled and others of us are not. It is because of the types of discrimination that some of us will suffer, and others of us will not. There is no "us" and "them." There is simply a vision of equality and justice.

It's time for Congress to restore the ADA and have it fulfill its true promise.

Thank you.

[The prepared statement of Ms. Feldblum follows:]

PREPARED STATEMENT OF CHAI R. FELDBLUM

Mr. Chairman and members of the committee, I am pleased to testify before you today. My name is Chai Feldblum, and I am a Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center. The lawyers and students at the Federal Legislation Clinic provide *pro bono* legislative lawyering services to the Epilepsy Foundation in support of its efforts to advance the ADA Restoration Act.

Today, however, I am testifying on my own behalf as an expert on the Americans with Disabilities Act of 1990 (ADA). During passage of the ADA, I served as one of the lead legal advisors to the disability and civil rights communities in the drafting and negotiating of that legislation.

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00044 Fmt 6633 Sfmt 6621 S:\DOCS\39388.TXT DENISE

In this testimony, I provide a brief overview of the bipartisan support that propelled passage of the ADA in 1990 and describe how Congress intended the ADA's definition of disability to be consistent with the definition of "handicap" that had been applied by the courts for 15 years under Sections 501, 503 and 504 of the Rehabilitation Act of 1973. I then explain how the courts have narrowed the definition of disability under the ADA in a manner that is inconsistent with Congressional intent and I offer some observations on why the courts may have acted in such a manner. Finally, I explain how the current status quo should be considered unacceptable to any Congress that cares about providing substantive and real protection for people with disabilities and how the only way to fix this problem is to fix the language of the ADA itself.

I. THE BI-PARTISAN ENACTMENT OF THE ADA

A first version of the ADA was introduced in April 1988 by Senators Lowell Weicker and Tom Harkin and 12 other cosponsors in the Senate, and by Congressman Tony Coelho and 45 cosponsors in the House of Representatives.[1] This version of the ADA was based on a draft from the National Council on Disability (NCD), an independent Federal agency composed of 15 members appointed by President George H.W. Bush which was established by Congress to advise the President and Congress on issues concerning people with disabilities.[2]

In May 1989, a second version of the ADA was introduced by Senators Tom Harkin, Edward Kennedy, Robert Dole, Orrin Hatch and 30 cosponsors in the Senate, and by Congressman Steny Hoyer and 45 cosponsors in the House of Representatives.[3] This version of the bill was the result of extensive discussions with a wide range of interested parties, including members of the disability community, the business community, and the first Bush administration.[4]

Negotiations on the ADA continued within each committee that reviewed the bill and, in each case, the negotiations resulted in broad, bipartisan support of the legislation. The Senate Committee on Labor and Human Resources favorably reported the bill by a vote of 16–0;[5] the House Committee on Education and Labor favorably reported the bill by a vote of 35–0;[6] the House Committee on Energy and Commerce favorably reported the bill by a vote of 40–3;[7] the House Committee on Public Works and Transportation favorably reported the bill by a vote of 45–5;[8] and the House Committee on the Judiciary favorably reported the bill by a vote of 32–3.[9]

After being reported out of the various committees, the ADA passed the Senate by a vote of 76–8 in September 1989 and the House of Representatives by a vote of 403–20 in May 1990.[10] Both Houses of Congress subsequently passed the conference report by large margins as well: 91–6 in the Senate and 377–28 in the House of Representatives.[11]

On July 26, 1990, President George H.W. Bush signed the ADA into law, stating:

> [N]ow I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from

---

[1] H.R. 4498, 100th Cong., 2d Sess., 134 Cong. Rec. H2757 (daily ed. Apr. 29, 1988) (introduction of H.R. 4498); S. 2345, 100th Cong., 2d Sess., 134 Cong. Rec. S5089 (daily ed. Apr. 28, 1988) (introduction of S. 2345).

[2] National Council on Disabilities, on the Threshold of Independence (1988), *available at http://www.ncd.gov/newsroom/publications/1988/threshold.htm*. Lowell Weicker, at that time, the Republican Senator from Connecticut and the ranking minority member of the Subcommittee on the Handicapped, was approached by the National Council on Disability to take the lead on the ADA because of his longstanding interest in the area of disability rights. Senator Tom Harkin, a Democratic Senator from Iowa and Chairman of the Subcommittee on the Handicapped, worked closely with Senator Weicker in this endeavor. In the House of Representatives, Congressman Tony Coelho, a Democrat from California and third-ranking member in the House Democratic Leadership, was the key leader in the development of the ADA.

[3] H.R. 2273, 101st Cong., 1st Sess., 135 Cong. Rec. H1791 (daily ed. May 9, 1989); S. 933, 101st Cong., 1st Sess., 135 Cong. Rec. S4984–98 (daily ed. May 9, 1989).

[4] *See* Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 Temple Law Review 521, 521–532 (1991) (providing a brief overview of passage of the ADA, including a brief description of the various stages of negotiation on the bill).

[5] S. Rep. No. 101–116 at 1 (1989).

[6] H.R. Rep. No. 101–485, pt. 2, at 50 (1990).

[7] H.R. Rep. No. 101–485, pt. 4, at 29 (1990).

[8] H.R. Rep. No. 101–485, pt. 1, at 52 (1990).

[9] H.R. Rep. No. 101–485, pt. 3, at 25 (1990).

[10] 135 Cong. Rec. S10803 (daily ed. Sept. 7, 1989); 136 Cong. Rec. H2638 (daily ed. May 22, 1990).

[11] 136 Cong. Rec. S9695 (daily ed. July 13, 1990); 136 Cong. Rec. H4629 (daily ed. July 12, 1990).

> the freedom they could glimpse, but could not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America."[12]

Standing together, leaders from both parties described the ADA as "historic," "landmark," and an "emancipation proclamation for people with disabilities."[13]

The purpose of the original legislation was to "provide a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "to provide clear, strong, consistent, enforceable standards" for addressing such discrimination.[14] It was Congress' hope and intention that people with disabilities would be protected from discrimination in the same manner as those who had experienced discrimination on the basis of race, color, sex, national origin, religion, or age.[15]

But that did not happen. In recent years, the Supreme Court has restricted the reach of the ADA's protections by narrowly construing the definition of disability contrary to congressional intent. As a result, people with a wide range of impairments whom Congress intended to protect, including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, post-traumatic stress disorder (PTSD), and many other impairments, are routinely found not to be "disabled" and therefore not covered by the ADA.

The difficulty with this scope of coverage under the ADA is significant—studies show that plaintiffs lose 97 percent of ADA employment discrimination claims, frequently on the grounds that they do not meet the definition of "disability."[16] The National Council on Disability has stated that Supreme Court decisions narrowing the definition of disability "ha[ve] significantly diminished the civil rights of people with disabilities," "blunt[ing] the Act's impact in significant ways," and "dramatic[ally] narrowing and weakening . . . the protection provided by the ADA."[17]

As demonstrated by the legislative history of the ADA, Congress never intended the law's definition to be interpreted in such a restrictive fashion.

II. CONGRESSIONAL INTENT BEHIND THE ADA'S DEFINITION OF DISABILITY

When writing the ADA that was introduced in 1989, Congress borrowed the definition of "disability" from Sections 501, 503 and 504 of the Rehabilitation Act of 1973, a predecessor civil rights statute for people with disabilities that covered the Federal Government, Federal contractors, and recipients of Federal financial assist-

---

[12] Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at http://www.eeoc.gov/ada/bushspeech.html*.

[13] According to President George H.W. Bush, the ADA was a "landmark" law, an "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities." *See id.* Senator Orrin G. Hatch declared that the ADA was "historic legislation" demonstrating that "in this great country of freedom, . . . we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society." Senator Edward M. Kennedy called the ADA a "bill of rights" and "emancipation proclamation" for people with disabilities. See National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), available at *http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm*.

[14] See Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

[15] 42 U.S.C. § 12101 (a), (b).

[16] Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 Mental & Physical Disability L. Rep. 328, 328 (July/August 2007) (stating that in 2006, "[o]f the 218 [employment discrimination] decisions that resolved the claim (and have not yet changed on appeal), 97.2 percent resulted in employer wins and 2.8 percent in employee wins"); *see also* Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I—Survey Update*, 28 Mental & Physical Disability L. Rep. 319, 319–20 (May/June 2003) ("One such obstacle [for plaintiffs to overcome] is satisfying the requirements that the plaintiff meet the ADA's restrictive definition of disability—a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment—and still be qualified to perform essential job functions with or without reasonable accommodation. *A clear majority of the employer wins in this survey were due to employees' failure to show that they had a protected disability*.") (emphasis added); *see also* Ruth Colker, *Winning and Losing Under the ADA,* 62 Ohio St. L.J. 239, 246 (2001) ("[A]ppellate litigation outcomes under the ADA are more pro-defendant than under other civil rights statutes."); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.–C.L. L. Rev. 99, 100–01 ("[C]ontrary to popular media accounts, defendants prevail in more than 93 percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in 84 percent of reported cases. These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly.").

[17] National Council on Disabilities, Righting the ADA, pt. I (2004), *available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm*.

ance. For purposes of Title V of the Rehabilitation Act, "handicap" was defined as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.[18]

For 15 years, the courts had interpreted this definition to cover a wide range of physical and mental impairments, including epilepsy, diabetes, intellectual and developmental disabilities, multiple sclerosis, PTSD, and HIV infection.[19] Indeed, in *School Board of Nassau County* v. *Arline*, the Supreme Court explicitly acknowledged that section 504's "definition of handicap is broad," and that by extending the definition to cover those "regarded as" handicapped, Congress intended to cover those who are not limited by an actual impairment but are instead limited by "society's accumulated myths and fears about disability and disease."[20]

When the ADA was enacted, Congress consistently referred to court interpretations of "handicap" under section 504 as its model for the scope of "disability" under the ADA. For example, the Senate Committee on Labor and Human Resources noted that:

> "the analysis of the term 'individual with handicaps' by the Department of Health, Education and Welfare in the regulations implementing section 504 . . . apply to the definition of the term 'disability' included in this legislation."[21]

Similarly, the House Committee on the Judiciary observed that:

> "The ADA uses the same basic definition of 'disability' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988. . . . [I]t has worked well since it was adopted in 1973."[22]

Second, the committee reports explicitly stated that mitigating measures should not be taken into account in determining whether a person has a "disability" for purposes of the ADA. As the Senate Committee on Labor and Human Resources put it:

> A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. . . . [W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.[23]

Finally, the committee reports specifically referenced the breadth of the interpretation offered by the Supreme Court in the *Arline* decision with regard to the third prong of the definition of disability, the "regarded as" prong. During oral argument in the *Arline* case, the Solicitor General had sought to reject an interpretation of the "regarded as" prong that would have established coverage for any individual with an impairment, as long as the impairment was proven by the individual to have been the *basis* of an adverse decision. As the Solicitor General argued, such an approach would allow plaintiffs to make "a totally circular argument which lifts itself by its bootstraps."[24]

---

[18] 29 U.S.C. § 705(20)(B) (2007); *see* Americans with Disabilities Act, 42 U.S.C. § 12101(2) (2007). At the time the ADA was being drafted, section 504 used the term "handicap" rather than "disability." Section 504 has since been amended to use the term "disability." The definition of "handicap" under section 504 and of "disability" under the ADA is identical.

[19] *See, e.g., Local 1812, Am. Fed'n. of Gov't Employees* v. *U.S.*, 662 F. Supp. 50, 54 (D.D.C. 1987) (person with HIV disabled); *Reynolds* v. *Brock*, 815 F.2d 571, 573 (9th Cir. 1987) (person with epilepsy disabled); *Flowers* v. *Webb*, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983) (person with intellectual and developmental disabilities disabled); *Schmidt* v. *Bell*, No. 82–1758, 1983 WL 631, at *10 (E.D. Pa. Sept. 9, 1983) (person with PTSD disabled); *Bentivegna* v. *U.S. Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (person with diabetes disabled); *Pushkin* v. *Regents of Univ. of Colo.*, 658 F.2d 1372, 1376 (10th Cir. 1981) (person with multiple sclerosis disabled). *See generally* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkeley J. Emp. & Lab. L. 91, 128 (2000) (hereinafter "Definition of Disability") ("[A]lthough there had been . . . a few adverse judicial opinions under section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act.")

[20] *See School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 284 (1987).

[21] S. Rep. No. 101–116 at 21 (1989).

[22] H.R. Rep. No. 101–485, pt. 3, at 27 (1990).

[23] S. Rep. No. 101–116 at 121 (1989).

[24] *Arline,* 480 U.S. at 283 n.10 (1987).

But the Supreme Court had responded that "[t]he argument is not circular, however, but direct." [25] As the Court explained:

> "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." [26]

And, as the Court went on to explain:

> "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." [27]

That was the situation in the *Arline* case, where a school board regarded an individual with tuberculosis that was no longer limiting any of her major life activities as nonetheless limited in her *one job* of being a schoolteacher.

The committee reports to the ADA endorsed this view of the third prong of the definition. As the Senate Committee on Labor and Human Resources Report summarized the coverage under the third prong:

> "A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes toward disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the 'negative reactions' of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong." [28]

Because coverage under the third prong relies on a discriminatory action by one entity (e.g., an employer or a business), the fact that other entities may not hold the same adverse perception of the individual with the actual or perceived impairment is irrelevant. As the House Committee on the Judiciary Report put it:

> "[A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field, and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition." [29]

As evident from the ADA's legislative history, Congress' decision to adopt section 504's definition of disability was a deliberate decision to cover the same wide group of individuals who had been covered under that law. Congress expected that the definition of "disability" would be interpreted as broadly under the ADA as it had been interpreted under the existing disability rights law for over 15 years.

Disability rights advocates like myself—blissfully unaware of what the future would hold for the definition of disability—fully supported Congress' incorporation of the section 504 definition into the ADA. We agreed with Congress' legal judgment that the 15-year-old definition would cover people with a wide range of physical and mental impairments, based on the record in the case law under section 504. In addition, we were particularly reassured by the reasoning of the Supreme Court just 2 years earlier in the *Arline* case—the case so consistently referred to in the various committee reports. Under the Court's interpretation, the third prong of the definition was sufficiently broad to capture *any individual who had been explicitly discriminated against because of an actual or perceived impairment*, regardless of how minor that impairment was if it existed (e.g., a cosmetic disfigurement or a burn) or even if no impairment existed at all.

We were soon to be rudely surprised by new interpretations of the definition of disability by various courts, including the Supreme Court.

III. JUDICIAL NARROWING OF COVERAGE UNDER THE ADA

Over the past several years, the Supreme Court and lower courts have narrowed coverage under the ADA by interpreting *each and every component* of the ADA's def-

---

[25] *Id.*
[26] *Id.*
[27] *Id.* at 283; *see* Feldblum, *Definition of Disability, supra* note 19, 116–118 for a full analysis of the *Arline* opinion.
[28] S. Rep. No. 101–116 at 24 (1989); *see also* H.R. Rep. No. 101–485, pt. 2, at 53 (1990) (discussing *Arline*)
[29] H.R. Rep. No. 101–485, pt. 3, at 30 (1990).

inition of disability in a *strict and constrained fashion*. This has resulted in the exclusion of many persons that Congress intended to protect.[30]

The Supreme Court has narrowed coverage under the ADA in three primary ways:

(A) In 1999, by requiring that courts take into account mitigating measures when determining whether a person is "substantially limited in a major life activity";

(B) Also in 1999, by requiring people who allege that they are regarded as being substantially limited in the major life activity of working (because an employer has refused to hire them for a job based on an actual or perceived impairment) show that the discriminating employer believed them incapable of performing not just the one job they had been denied, but also a *broad range of jobs*; and

(C) In 2002, by requiring that the term "substantially limited" be applied in a very strict manner and that the term "major life activity" be understood as covering only activities that are of "central importance" to most people's lives.

A. Mitigating Measures

The Supreme Court, in a trio of cases decided in June 1999, ruled that mitigating measures—medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment—must be considered in determining whether an individual's impairment substantially limits a major life activity.[31]

Sutton v. United Airlines

In *Sutton* v. *United Airlines*, twin sisters, Karen Sutton and Kimberly Hinton, applied to United Airlines for jobs as commercial airline pilots. While they met United's age, education, and experience requirements, and had obtained all the appropriate pilot certifications, they did not meet United's minimum vision requirement of uncorrected vision of 20/100 or better. Ms. Sutton and Ms. Hinton were severely nearsighted (myopia), with uncorrected vision of 20/200 in the right eye and 20/400 in the left eye. But with glasses or contact lenses, they could see as well as people without myopia. When United terminated their job interviews and refused to offer them pilot positions, Ms. Sutton and Ms. Hinton filed a claim under the ADA, alleging that United had discriminated against them on the basis of disability in violation of the ADA.[32]

The *Sutton* case raised the question whether individuals who mitigate their impairments should be considered persons with disabilities under the ADA. The eight Federal Courts of Appeals that had addressed this issue prior to the *Sutton* case had agreed with guidance issued by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), which explicitly stated that the mitigating effects of medication or devices on an impairment should *not* be taken into account in determining whether an individual's impairment substantially limits the individual in a major life activity.[33] In *Sutton*, however, the Tenth Circuit (affirming the district court) concluded to the contrary, creating a split in the circuits. The Supreme Court resolved this split by affirming the Tenth Circuit's determination that mitigating measures should be taken into account in determining disability under the ADA.[34]

Relying exclusively on a plain reading of the statute, the Supreme Court reasoned that three provisions of the ADA required it to conclude that plaintiffs should be viewed in their "corrected state" in determining whether their impairments substantially limited their major life activities. First, because "the phrase 'substantially limits' appears in the Act in the present indicative verb form," it was proper to read that language as "requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[35] Second, because the act defines disability "with respect to an individual" and requires that an impairment substantially limit "the major life activities of such individual," the Court concluded that the law necessarily requires an "individualized inquiry."[36] Indeed, the Court explained, the EEOC had emphasized the need for such an individualized assessment, and yet its "directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry man-

[30] *See* Appendix A for coverage of people under section 504 as compared to the ADA; *see* Appendix B for case stories of people denied coverage under the ADA.

[31] *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy* v. *United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).

[32] *Sutton,* 527 U.S. at 475–76.

[33] *Id.* at 496–97 (Stevens, J., dissenting) (listing cases).

[34] *Id.* at 477, 495–96.

[35] *Id.* at 482.

[36] *Id.* at 483.

dated by the ADA."[37] Finally, since Congress had stated in its findings that there were 43 million people with disabilities, it was logically inconsistent to presume that Congress intended to cover the 100 million people estimated to have vision impairments. Thus, the finding regarding the number of people covered under the law "is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."[38]

The Court concluded that the "[EEOC's and DOJ's] guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an *impermissible interpretation* of the ADA."[39] The fact that the Senate Labor and Human Resources Committee Report, the House Judiciary Committee Report, and the House Education and Labor Committee Report had all offered the same interpretation as the agencies was irrelevant to the Court based on the following reasoning: [b]ecause we decide that, *by its terms*, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.[40]

Having concluded that three congressional committees, eight circuit courts, and two agencies had impermissibly interpreted the ADA by not considering mitigating measures, the Supreme Court held that Karen Sutton and Kimberly Hinton were not substantially limited in any major life activity and therefore were not covered by the ADA. Because Ms. Sutton and Ms. Hinton were found not to be "disabled," the Court never reached the question whether they were qualified to perform the job or whether United's vision requirement was discriminatory.[41]

Murphy v. United Parcel Service

In *Murphy* v. *United Parcel Service*, the United Parcel Service (UPS) hired Vaughn L. Murphy as a mechanic. The job required Mr. Murphy to drive commercial motor vehicles. According to Department of Transportation (DOT) health requirements, drivers of commercial motor vehicles in interstate commerce must have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely." Mr. Murphy has had hypertension (high blood pressure) since he was 10 years old. With medication, however, "he can function normally and can engage in activities that other persons normally do."[42]

At the time UPS hired him, Mr. Murphy's blood pressure was too high for Mr. Murphy to qualify for a DOT health certification. However, due to an error, he was erroneously granted certification and he started working for UPS. About a month later, a UPS medical supervisor discovered the error while reviewing Mr. Murphy's medical files and requested that he have his blood pressure retested. Upon retesting, Mr. Murphy's blood pressure, at 160/102 and 164/104, was not low enough to qualify him for the 1-year certification that he had incorrectly been issued, but it was sufficient to qualify him for an optional temporary DOT health certification. UPS fired Mr. Murphy on the grounds that his blood pressure exceeded DOT's requirement and refused to allow him to attempt to obtain the optional temporary certification.[43]

Believing UPS had discriminated against him based on disability, Mr. Murphy brought a claim under the ADA. Both the district court and the Tenth Circuit Court of Appeals determined that since Mr. Murphy functioned normally with medication, his high blood pressure did not substantially limit him in any major life activity and thus was not covered by the ADA. The Supreme Court agreed, citing its holding in *Sutton* that the determination of disability should be made with reference to mitigating measures. Because Mr. Murphy was found not to be "disabled" for purposes of the ADA, the Court never reached the question whether Mr. Murphy was qualified to perform the job or whether UPS had discriminated against him by refusing to allow him to obtain a temporary DOT health certification.[44]

Albertson's, Inc. v. Kirkingburg

In August 1990, Albertson's, Inc., a grocery-store chain, hired Hallie Kirkingburg as a truck driver. Mr. Kirkingburg had more than 10 years' driving experience and performed well on his road test for the job. Mr. Kirkingburg has an uncorrectable vision condition that involves weakened vision in one eye, so that he has in effect

[37] *Id.*
[38] *Id.* at 487.
[39] *Id.* at 482 (emphasis added).
[40] *Id.*
[41] *Id.* at 493–94.
[42] *Murphy,* 527 U.S. at 519–20.
[43] *Id.*
[44] *Id.* at 520–22, 525.

"monocular" vision, or vision in only one eye. Over time, Mr. Kirkinburg had learned to compensate for the weakened vision in his left eye by making subconscious adjustments to the manner in which he senses depth and perceived peripheral objects in his right eye.[45]

Before he started working, Albertson's required Kirkingburg to be examined by a doctor to see if he met Federal DOT vision standards for commercial truck drivers. Despite Kirkingburg's weakened vision in his left eye, the examining doctor erroneously certified that Kirkingburg met the DOT's basic vision standards. In December 1991, Mr. Kirkingburg took a leave of absence after injuring himself when he fell from the cab of his truck. Albertson's required returning employees to undergo a physical examination, which Mr. Kirkingburg did in November 1992. This time, the examining physician correctly assessed Kirkingburg's vision and found that his eyesight did not meet the basic DOT standards. Mr. Kirkingburg was told that he would have to obtain a waiver of the DOT's basic vision standards in order to be qualified to drive. DOT had a process for giving certification to applicants with deficient vision who had 3 years of recent experience driving a commercial vehicle with a clean driving record.[46]

Mr. Kirkingburg applied for a waiver, but while his application was pending, Albertson's fired him because he could not meet the basic DOT vision standard. Although Mr. Kirkingburg ultimately received a DOT waiver, Albertson's still refused to rehire him.[47]

Mr. Kirkingburg brought suit alleging that Albertson's violated the ADA by firing him. The district court ruled that Mr. Kirkingburg was not qualified for the job, and that Albertson's was not required, as a reasonable accommodation, to give him time to get a DOT waiver. The Ninth Circuit Court of Appeals reversed the district court's decision, holding that Albertson's could not use the DOT vision standard as the justification for its vision requirement and yet disregard the waiver program that was a legitimate part of the DOT program. Albertson also argued for the first time before the Ninth Circuit that Mr. Kirkingburg did not have a disability within the meaning of ADA. The Ninth Circuit rejected this argument, concluding that Mr. Kirkingburg had presented evidence that his vision was effectively monocular, and thus "the manner in which he sees differs significantly from the manner in which most people see."[48]

The Supreme Court reversed the Ninth Circuit, concluding that it had been "too quick to find a disability."[49] According to the Court, the Ninth Circuit's determination that Mr. Kirkingburg's manner of seeing was "different" from others was insufficient to show disability. Instead, Mr. Kirkingburg's sight must be "significantly restricted." Second, the Court determined that *Sutton's* mandate that courts consider mitigating measures includes "measures undertaken, whether consciously or not, with the body's own systems."[50] Thus, the Ninth Circuit should have considered the ability of Mr. Kirkingburg's brain to compensate for his monocular vision in determining whether he had a disability.[51] Third, contrary to the individualized assessment required under the ADA, the Ninth Circuit failed to identify the *extent* of Mr. Kirkingburg's visual restrictions.[52]

The Supreme Court's requirement that courts consider mitigating measures creates an unintended paradox: people with serious health conditions like epilepsy and diabetes, who are fortunate enough to find treatment that makes them more capable and independent, and thus more able to work, find they are not protected by the ADA because the limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person will be protected from discrimination, even if an em-

---

[45] *Albertson's,* 527 U.S. at 558–59, 565.
[46] *Id.* at 559–60.
[47] *Id.* at 560.
[48] *Id.* at 561.
[49] *Id.* at 564.
[50] *Id.* at 565–66.
[51] *Id.*
[52] As for Albertson's primary contention—that Mr. Kirkingburg was not qualified—the Court declared that Albertson's had both a "right" and an "unconditional obligation" to follow the DOT commercial truck driver regulations. *Id.* at 570. The Supreme Court ruled that "[t]he waiver program was simply an experiment with safety" and "did not modify the general visual acuity standards." *Id.* at 574. Since the DOT regulation did not require employers of commercial drivers to participate in the experimental waiver program, Albertson's was free to decline to do so. *Id.* at 577.

ployer admits that he or she dismissed the person *because* of that person's (mitigated) condition.[53]

B. Broad Range of Jobs Under "Regarded as" Prong

In *Sutton*, the sisters had also argued that United "regarded" them as substantially limited in the major life activity of working and, therefore, that they should be covered under the third prong of the definition of disability. They contended that United's vision requirement "substantially limited their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot."[54]

The Supreme Court rejected that analysis by applying the EEOC's regulations concerning the major life activity of "working" to the third prong of the definition—despite EEOC's explicit guidance to the contrary.

The Court ruled that:

> "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a *broad class of jobs*."[55]

As support for this ruling, the Court quoted a sentence from the regulation interpreting the phrase "substantially limits": "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[56] The Court thus concluded that because the sisters had failed to show that United regarded them as incapable of performing a *broad range of jobs*—beyond the single job of "global airline pilot"—they were not regarded as being substantially limited in the major life activity of working.[57]

In reaching its conclusion, the Court ignored the EEOC's guidance on how the major life activity of working was to be understood *differently* for purposes of the first and third prongs of the definition of disability. The EEOC had noted in its guidance that the major life activity of working should be considered under the first prong of the definition only in the rare situation in which an individual was not limited in any *other* major life activity.[58] As noted above, in most cases decided under the Rehabilitation Act, individuals with a range of impairments had been held by the courts (without significant analysis) to be substantially limited in such major life activities as standing, lifting, breathing, walking, bending, seeing or hearing. Thus, according to the EEOC, the only time an individual should argue that he or she was limited in the major life activity of working under the first prong of the definition was when the person was not experiencing a limitation in any other life activity. In such circumstances, the EEOC regulations provided, the individual would have to prove that he or she was limited in a broad class of jobs, and not just in one job.[59]

By contrast, the EEOC's guidance for "*Regarded as Substantially* Limited in a Major Life Activity" was quite different.[60] In that section of the guidance, the EEOC explained as follows:

> The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. . . .

---

[53] *See* examples below in section IV.

[54] *Sutton,* 527 at 490.

[55] *Id.* at 491.

[56] *Id.* (quoting 29 CFR §1630.2(j)(3)(i)). The regulation states: (3) With respect to the major life activity of working—; (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

[57] *Id.* at 493.

[58] *See* 29 CFR pt. 1630, App. §1630.2(j) ("If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. *If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.*") (emphasis added.)

[59] *Id.*

[60] *See* 29 CFR pt. 1630, App. §1630.2(l) (emphasis added).

> An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, *whether or not the employer's or other covered entity's perception were shared by others in the field* and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. . . .
>
> Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.[61]

Unfortunately, the Supreme Court ignored the logic of the EEOC's guidance and imported to the third prong of the definition a restriction that had made sense under the first prong of the definition, but made no sense at all under the third prong. The formulation enunciated by the Supreme Court now erects an almost impossible threshold for any individual seeking coverage under the third prong. The Court's approach requires that an individual essentially both divine and prove an employer's subjective state of mind. Not only must an individual demonstrate that the employer believed the individual had an impairment that prevented him or her from working for that employer in that job, the individual must also show that the employer thought that the impairment would prevent the individual from performing a broad class of jobs for other employers. As it is safe to assume that employers do not regularly consider the panoply of other jobs that prospective or current employees could or could not perform—and certainly do not often create direct evidence of such considerations—the individual's burden becomes essentially insurmountable.

While the "one-two punch" of the *Sutton* trilogy—requiring consideration of mitigating measures under the first prong of the definition and requiring proof of being regarded as substantially limited in a range of jobs under the third prong of the definition—began the slide toward non-coverage under the ADA for people with a range of physical and mental impairments, the Court made the situation worse 3 years later in another decision regarding the definition of disability.

C. Demanding Standard: Substantially Limits a Major Life Activity

In 2002, the Supreme Court considered the case of *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*.[62] In that case, Toyota Motor Manufacturing, Kentucky, Inc., hired Ella Williams to work on an engine assembly line at its car manufacturing plant in Georgetown, Kentucky. Soon after she began to work with pneumatic tools (tools using pressurized air), Ms. Williams developed carpal tunnel syndrome and tendonitis that caused pain in both of her hands, wrists, and arms. Williams' personal physician placed her on permanent work restrictions that precluded her from lifting more than 20 pounds, from frequent lifting of even lighter objects, from constant repetitive motions of her wrists or elbows, from performing overhead work, and from using vibratory or pneumatic tools.[63]

As a result, Toyota assigned Ms. Williams to various modified duty jobs. Eventually she was assigned to work as part of a Quality Control Inspection Operations team, where she routinely performed two of the four tasks of the team, both of which involved solely visual inspections. Ms. Williams satisfactorily performed these tasks for a period of 2 years.

Toyota then decided that all members of the teams should rotate through all four of the Quality Control Inspection tasks. Ms. Williams was therefore ordered to apply highlight oil to several parts of cars as they passed on the assembly line, requiring her to hold her hands and arms up around her shoulder level for several hours at a time. As a result, she began experiencing pain in her neck and shoulders, and was diagnosed as having several medical conditions that cause inflammation and pain in the arms and shoulders.[64] Toyota refused to make an exception to its policy and permit Williams to continue performing only the visual inspection tasks.

Ms. Williams filed an ADA claim, alleging that Toyota had failed to accommodate her disability. The district court ruled that Ms. Williams was not "disabled" under the ADA because her impairments did not substantially limit her in a major life activity. The Sixth Circuit Court of Appeals reversed, holding that Ms. Williams' impairments did substantially limit her in the major life activity of performing manual

---

[61] *Id.* (emphasis added)
[62] 534 U.S. 184 (2002).
[63] *Id.* at 187–88.
[64] *Id.* at 188–90.

tasks. The Supreme Court reversed, holding that the Sixth Circuit had failed to apply the proper standard in determining whether Ms. Williams was disabled "because it analyzed only a limited class of manual tasks and failed to ask whether [Ms. Williams'] impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives."[65]

The full adverse import of the Supreme Court's ruling, however, lay in its broad pronouncements regarding the proper interpretation of the words "substantially limits" and "major life activities." The Court stated that, given the finding in the ADA that 43 million people have disabilities, these terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[66] Indeed, "[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number would surely have been much higher."[67]

According to the Court, "'[s]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'"[68] Therefore, the Court reasoned, "the word 'substantial' clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from constituting disabilities" under the ADA.[69] The Court also stated that "[m]ajor in the phrase 'major life activities' means important," and so "major life activities" refers to "those activities that are of central importance to daily life," including "household chores, bathing, and brushing one's teeth."[70]

As a result of this ruling, people alleging discrimination under the ADA must now show that their impairments *prevent* or *severely restrict* them from doing activities that are of *central importance to most* people's daily lives.[71]

Through these three aspects of interpretation, the Supreme Court and the lower courts have dramatically changed the meaning of "disability" under the ADA over the past number of years so as to make it almost unrecognizable. Many of the people whom Congress intended to protect find that they are no longer "disabled" under the ADA; they are never even given the opportunity to show they can do the job and were treated unfairly because of their medical condition.

The Supreme Court's narrow reading is in marked contrast to the cases that had been decided under the Rehabilitation Act, which Congress had before it as precedent when it enacted the ADA. In these cases, the courts had tended to decide questions of coverage easily and without extensive analysis.[72] This narrow reading is likewise inconsistent with other civil rights statutes, such as the Civil Rights Act of 1964, upon which the ADA was modeled[73] and which courts have also interpreted broadly.[74] Indeed, under the Rehabilitation Act and Title VII of the Civil Rights Act, courts rarely tarried long on the question of whether the plaintiff in a case was "really a handicapped individual," or "really a woman," or "really black." Instead, these cases tended to focus on the essential causation requirement: i.e., had the individual proven that the alleged discriminatory action had been taken *because* of his or her handicap, race, or gender?[75]

But how did this happen? How did a statutory definition that Members of Congress and disability rights advocates felt would ensure protection for a broad range of individuals end up becoming the principal means of restricting coverage under the ADA?

There is a range of academic literature on this question, including some to which I have contributed. But let me point out here simply one observation. From my

---

[65] *Id.* at 187.
[66] *Id.* at 197.
[67] *Id.*
[68] *Id.* at 196.
[69] *Id.* at 197.
[70] *Id.* at 197, 201–02. Because Ms. Williams was able to brush her teeth and do laundry, she was therefore *not* substantially limited in the activities of central importance to the daily lives of most people. *Id.* at 202.
[71] *Id.* at 197.
[72] Feldblum, *Definition of Disability, supra* note 19, at 128; *see also* Appendix A, for coverage of people under section 504 as compared to the ADA.
[73] 42 U.S.C. § 12101 (2007) ("[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.").
[74] *See, e.g., Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 381 (1977) (Marshall and Brennan, JJ., concurring in part and dissenting in part) ("Title VII is a remedial statute designed to eradicate certain invidious employment practices . . . [and], under longstanding principles of statutory construction, the Act should be given a liberal interpretation." (internal quotation marks and citation omitted)).
[75] Feldblum, *Definition of Disability, supra* note 19, at 106.

reading of the cases, it seems to me that the instinctive understanding by many courts of the term "disability" is that it is synonymous with an "inability to work or function," and concomitantly, that people with disabilities are thus necessarily viewed as significantly different from "the rest of us."

This view of disability may have been influenced by the fact that most disability cases heard by courts prior to the ADA regarded claims for disability payments under Social Security. In those cases, an individual was required to demonstrate that he or she had a "medically determinable physical or mental impairment" that made him or her unable "to engage in any substantial gainful activity"—i.e., that he or she was unable to work.[76] Hence, it may have been difficult for courts to grasp that the congressional intent under the ADA was to capture a much broader range of individuals with physical and mental impairments than those intended to be covered under Social Security disability law.[77]

But a civil rights law is not a disability payment law. The goal of the ADA is to prohibit *discrimination* against a person because of his or her disability. A person does not have to be unable to work in order to face discrimination based on his or her impairment. On the contrary, people who are perfectly able to perform their jobs—sometimes thanks to the very medications or devices they use—are precisely the ones who may face discrimination because of myths, fears, ignorance, or stereotypes about their medical conditions.

Similarly, in a civil rights context, requiring a person to meet an extremely high standard for qualifying as "disabled" is counter-intuitive if an employer has taken an adverse action based on an individual's physical or mental impairment. Requiring the person to reveal private, highly personal, and potentially embarrassing facts to employers and judges about the various ways the individual's impairment impacts daily living, simply and only to demonstrate the severity of the impairment, is completely unnecessary to deciding whether unjust discrimination has occurred.[78]

Finally, it is inconsistent with a civil rights law to excuse an employer's behavior simply because other employers may not also act in a similar discriminatory fashion. As the court made clear in *Arline*, if an employer fires an individual expressly because of an impairment, that is sufficient to establish coverage for the individual under the "regarded as" prong of the definition of disability. Of course, an action of this nature would not suffice to qualify an individual for *disability payments*. But it certainly is sufficient to raise a viable claim of discrimination based on that impairment, regardless of whether other employers would have discriminated against the individual as well.

IV. THE REAL LIFE IMPACT OF SHRINKING COVERAGE UNDER THE ADA

Regardless of what one believes about the original intent of Congress in passing the ADA, the relevant question for Congress *today* is whether people with a range of physical and mental impairments are being treated fairly—*today*. Consider the following real-life impacts of the Supreme Court's ruling with regard to mitigating measures:

• Stephen Orr, a pharmacist in Nebraska, was fired from his job at Wal-Mart because he needed to take a half-hour uninterrupted lunch break to manage his diabetes. When Mr. Orr challenged his firing under the ADA, Wal-Mart argued that since Mr. Orr did so well managing his diabetes with insulin and diet, he was not "disabled" under the ADA. The courts agreed. Although Wal-Mart considered Mr. Orr "too disabled" to work for Wal-Mart, he was not disabled "enough" to challenge his firing under the ADA.[79]

---

[76] 42 U.S.C. § 423(d)(1)(A) (2007) (SSDI); 42 U.S.C. § 1382c(a)(3)(A) (2007) (SSI).

[77] *See* Feldblum, *Definition of Disability*, supra n. 19, at 97, 140.

[78] As I also note in my academic article, there are other elements that are in play here. For example, "EEOC regulations that emphasize individualized assessments of the impact of impairments on particular individuals, a sophisticated management bar trained in seminars to carefully parse the statutory text of the definition, and finally, the terms of the definition itself, have all resulted in a reading of the ADA that has radically reduced the number of people who can claim coverage under the law." Feldblum, *Definition of Disability, supra* n. 19, at 140; *see also id*. at 152 ("[W]hile individualized assessments are . . . critical in determining whether an individual with a disability is qualified for a job (including whether a reasonable accommodation is due to an individual in a particular case), the idea that an individualized assessment would be used to determine whether one person with epilepsy would be covered under the law, while another person with epilepsy would not, was completely foreign both to section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates. The words of the ADA, however, can lend themselves to such an interpretation, and the fact that the EEOC's guidance expressly endorsed such an interpretation has cemented that approach in the courts.").

[79] *Orr* v. *Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

• James Todd, a shelf-stocking clerk at a sporting goods store in Texas, was fired from his job a few months after experiencing a seizure at work. Mr. Todd challenged his firing under the ADA, but the district court never reached the question of whether Mr. Todd had been fired because of his epilepsy. Instead, the court concluded that since Mr. Todd's epilepsy was otherwise well-managed with anti-seizure medication, he was not disabled "enough" to challenge his firing under the ADA.[80]

• Allen Epstein, the CEO of an insurance brokerage firm, was demoted from his job after being hospitalized because of heart disease. He was later fired shortly after telling his employer he had diabetes. Mr. Epstein brought a claim under the ADA, alleging that his employer had discriminated against him because of disability. The court held that because his heart disease and diabetes were well-managed with medication, he was not disabled "enough" to challenge his firing under the ADA.[81]

• Ruth Eckhaus, a railroad employee who uses a hearing aid, was fired by her employer who told her that he "could not hire someone with a hearing aid because [the employer] had no way of knowing if she would remember to bring her hearing aid to work." Ms. Eckhaus brought a claim under the ADA, alleging that she was discriminated against based on her hearing impairment. The court concluded that since her hearing aid helped correct her hearing impairment, Ms. Eckhaus was not disabled "enough" to challenge discrimination based on that impairment.[82]

• Michael Schriner, a salesperson who developed major depression and PTSD after discovering that his minor children had been abused, was fired from his job for failing to attend a training session. Believing he was fired because of his depression and PTSD, Mr. Schriner brought a claim under the ADA. But the court never addressed whether his disability was the reason he was fired. Instead, that court concluded that because Mr. Schriner did so well managing his condition with medication, he was not disabled "enough" to be protected by the ADA.[83]

• Michael McMullin, a career law enforcement officer from Wyoming, was fired from his job as a court security officer because an examining physician determined that his clinical depression and use of medication disqualified him from his job. When Mr. McMullin challenged his firing under the ADA, his employer argued that Mr. McMullin was not "disabled" under the ADA because he had successfully managed his condition with medication for over 15 years. The court agreed. Even though Mr. McMullin's employer had fired him because of his use of medication, the court ruled that he was not disabled "enough" to challenge the discrimination under the ADA. According to the court, "[t]his is one of the rare, but not unheard of, cases in which many of the plaintiff's claims are favored by equity, but foreclosed by the law."[84]

Is this what Congress believes the law should be today?

Or consider the impact of the Supreme Court's ruling, that to be covered under the third prong of the definition, an individual must prove that his or her employer thought that he or she was incapable of performing a *broad range of jobs*:

• Rhua Dale Williams, an offshore crane operator with 20 years' experience, was refused a crane operator job because of his two prior back surgeries. Believing the company had regarded him as disabled, Mr. Williams filed a claim under the ADA. The court held that because Mr. Williams had shown that the company believed him incapable of performing only the job of offshore crane operator—and not the job of crane operator more generally—he was not regarded as incapable of performing a broad range of jobs. As a result, Mr. Williams was not covered by the ADA.[85]

• Hundreds of applicants for truck-driving positions were refused jobs at a motor carrier company solely because of a blanket exclusionary policy that prohibited the hiring of people who used certain prescription medications. The applicants alleged that the company had regarded them as disabled. The courts disagreed, holding that since the applicants had shown only that the company believed them incapable of working as truck drivers *for the company*—and not as truck drivers *in general*—they were not regarded as incapable of performing a broad range of jobs. As a result, the applicants were not covered by the ADA.[86]

Is this what Congress believes the law should be today?

---

[80] *Todd* v. *Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999).
[81] *Epstein* v. *Kalvin-Miller International, Inc.*, 100 F. Supp. 2d 222 (S.D.N.Y. 2000).
[82] *Eckhaus* v. *Consolidated Rail Corp.*, No. Civ. 00–5748(WGB), 2003 WL 23205042 (D.N.J. Dec. 24, 2003)
[83] *Schriner* v. *Sysco Food Serv.*, No. Civ. 1CV032122, 2005 WL 1498497 (M.D. Pa. June 23, 2005).
[84] *McMullin* v. *Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004).
[85] *E.E.O.C.* v. *HBH Inc.*, No. Civ.A. 98–2632, 1999 WL 1138533 (E.D.La. Dec. 9, 1999).
[86] *E.E.O.C.* v. *J.B. Hunt Transport, Inc.*, 321 F.3d 69 (2d Cir. 2003).

Finally, consider the following real-life impacts of the Supreme Court's ruling that the terms "substantially limits" and "major life activity" must be interpreted strictly:

• Carey McClure, an electrician with 20 years of experience, was offered a job at a General Motors' (GM) assembly plant pending completion of a pre-employment physical exam. When the examining physician saw that Mr. McClure could only lift his arms to shoulder level, Mr. McClure explained that he had muscular dystrophy, and that he could do overhead work by using a ladder, as electricians often do. The physician revoked the job offer, and Mr. McClure brought a claim under the ADA. Even though GM revoked Mr. McClure's job offer because of limitations resulting from his muscular dystrophy, GM argued in court that Mr. McClure did not have a "disability" and was not protected by the ADA. The courts agreed. According to the Fifth Circuit Court of Appeals:

> [Mr. McClure] has adapted how he bathes, combs his hair, brushes his teeth, dresses, eats, and performs manual tasks by supporting one arm with the other, repositioning his body, or using a step-stool or ladder. . . . [Mr. McClure's] ability to overcome the obstacles that life has placed in his path is admirable. In light of this ability, however, we cannot say that the record supports the conclusion that his impairment substantially limits his ability to engage in one or more major life activities.[87]

• Vanessa Turpin, an auto packaging machine operator with epilepsy, resigned after her employer required her to take a work-shift that would have worsened her seizures. Ms. Turpin challenged her employer's actions by filing a claim under the ADA, but the court never decided whether these actions were discriminatory. The court held that even though Vanessa Turpin experienced nighttime seizures characterized by "shaking, kicking, salivating and, on at least one occasion, bedwetting," which caused her to "wake up with bruises on her arms and legs," Vanessa was not "disabled" because "[m]any individuals fail to receive a full night sleep." The court further held that Vanessa's daytime seizures, which "normally lasted a couple of minutes" and which caused her to "bec[o]me unaware of and unresponsive to her surroundings" and "to suffer memory loss," did not render her "disabled" because "many other adults in the general population suffer from a few incidents of forgetfulness a week." [88]

• Zelma Williams is a right-hand dominant person whose right arm was amputated below the elbow. Despite an exemplary work record, Ms. Williams was not among those rehired after the company for which she worked was sold. Ms. Williams brought a claim under the ADA, but the court never decided whether her employer discriminated against her because of disability. Instead, the court held that Ms. Williams was not "disabled" because she was not "prevented or severely restricted from doing activities that are of central importance to most people's daily's lives . . . [like] household chores, bathing oneself, and brushing one's teeth." According to the court, Ms. Williams' amputated arm was only a "physical impairment, nothing more." [89]

• Christopher Phillips, a store maintenance worker with a traumatic brain injury, brought a claim under the ADA after he was fired from his job. Although Mr. Phillips' brain injury caused a 4-month coma, weeks of rehabilitation, an inability to work for 14 years, blurred vision, dizziness, spasms in his arms and hands, slowed learning, headaches, poor coordination, and slowed speech, the court held that "this evidence does not establish that [Mr. Phillips] is substantially limited in the major life activities of learning, speaking, seeing, performing manual tasks, eating or drinking." Therefore, Mr. Phillips was not "disabled" under the ADA.[90]

• Robert Tockes, a truck driver who had limited use of one hand as a result of an injury he sustained in the Army, was fired from his job and was told by his employer that "he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person." Mr. Tockes brought a claim under the ADA, but the court never addressed whether he had been discriminated against. Instead, the court concluded that he was not protected by the ADA because he was not "disabled." While, "[o]bviously [the employer] knew [Mr. Tockes] had a disability," the court stated, that "does not mean that it thought him

---

[87] *McClure* v. *General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).
[88] *Equal Employment Opportunity Comm'n* v. *Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).
[89] *Williams* v. *Cars Collision Center, LLC*, No. 06 C 2105 (N.D. Ill. July 9, 2007).
[90] *Phillips* v. *Wal-Mart Stores, Inc.*, 78 F. Supp. 2d 1274 (S.D. Ala. 1999).

so far disabled as to fall within the restrictive meaning the ADA assigns to the term".[91]

• Mary Ann Pimental, a registered nurse with stage III breast cancer, took time from work to undergo a mastectomy, chemotherapy, and radiation therapy. While Mary Ann was hospitalized and receiving treatment for cancer, the hospital reorganized its management team and eliminated Mary Ann's position. When the hospital refused to rehire her into an equivalent position, Ms. Pimental brought a claim under the ADA. But the court never decided whether Ms. Pimental's breast cancer played a role in the hospital's hiring decision. Instead, the court agreed with the hospital that "the most substantial side effects [of Ms. Pimental's breast cancer and treatment] were (relatively speaking) short-lived" and therefore "they did not have a substantial and lasting effect on the major activities of her daily life." Because Ms. Pimental failed to show she was limited by the breast cancer on a "permanent or long-term basis," she was held to be not "disabled" and therefore not protected by the ADA. Sadly, Ms. Pimental died of breast cancer 4 months after the court issued its decision.[92]

• Daniel Didier, a frozen food delivery manager with a permanently injured arm, was fired from his job because of limitations resulting from his injury. Believing he had been discriminated against based on disability, Mr. Didier challenged his firing under the ADA. Despite firing Mr. Didier because of his physical limitations, his employer argued in court that his limitations did not rise to the level of "disability" under the ADA. The court agreed. Even though Mr. Didier "does have some medically imposed restrictions," the court stated, "he has not met his burden of showing that the extent of his limitations due to his impairment are 'substantial.'" According to the court, since Mr. Didier was able to perform activities of daily living, "such as shaving and brushing his teeth, with his left hand . . . he does not have a disability as defined under the first prong of the ADA."[93]

• Charles Littleton, a 29-year-old man who was diagnosed with "mental retardation" as a young child, applied for a cart-pusher position at Wal-Mart. When he got to the interview, Wal-Mart refused to allow his job coach into the interview as previously agreed upon. The interview did not go well for Mr. Littleton and he did not get the job. Believing he had been discriminated against because of his disability, Mr. Littleton brought a claim under the ADA. But the courts never determined whether Wal-Mart discriminated against him because of his disability. Instead, the courts simply ruled that Mr. Littleton was not "disabled" under the ADA. While acknowledging that Mr. Littleton "is somewhat limited in his ability to learn because of his mental retardation," the Eleventh Circuit Court of Appeals concluded that he was not *substantially* limited in his ability to learn because he could read. In addition, the court concluded that while "[i]t is unclear whether thinking, communicating, and social interaction are 'major life activities' under the ADA," Mr. Littleton was not *substantially* limited in these activities because he was able to drive a car and communicate with words.[94]

Is this what Congress thinks the law should be today?

Many of us believe the ADA today is not doing the job it was intended to do. We believe the technical words of the ADA have been misused and misapplied by the courts to exclude people who deserve coverage under the law.[95]

The National Council on Disability, relying upon the expertise of a range of lawyers provided over a period of time, has suggested that the best way to fix the problems encountered in the courts is to change the language of the ADA so that it forces the court to focus on the *reason* an adverse action has been taken, rather

---

[91] *Tockes* v. *Air-Land Transport Services, Inc.*, 343 F.3d 895 (7th Cir. 2003).

[92] *Pimental* v. *Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002).

[93] *Didier* v. *Schwan Food Co.*, 387 F. Supp. 2d 987 (W.D. Ark. 2005).

[94] *Littleton* v. *Wal-Mart Stores, Inc.*, 231 Fed. Appx. 874 (11th Cir. 2007).

[95] *See* Feldblum, Definition of Disability, *supra* note 19, at 93 ("That decision [*Sutton*] threw into question coverage for thousands of individuals with impairments whom I, and other advocates who worked on the ADA, presumed Congress had intended to cover when it passed the ADA."); *see also* Claudia Center and Andrew J. Imparato, *Development in Disability Rights: Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 Stan. L. & Pol'y Rev 321, 323 (2003) ("In light of the unwillingness of the U.S. Supreme Court and the lower Federal courts to interpret the ADA's definition of disability in an inclusive manner, consistent with the intent of the law's drafters in Congress, it is time to rewrite the ADA's definition of disability and restore civil rights protections to the millions of Americans who experience disability-based discrimination."); Robert Burgdorf, *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 561 (1997) ("The restrictive interpretations of statutory protection under the ADA and Rehabilitation Act, however, have engendered a situation in which many cases are decided solely by looking at the characteristics of the plaintiff.").

than on the specifics of a person's physical or mental condition.[96] In this way, litigation under the ADA would mirror litigation under Title VII of the Civil Rights Act—in which a plaintiff must prove that discrimination occurred *because of* race, sex, religion, or national origin, but is not required to get into the specifics of his or her race, sex, religion, or national origin.

One can achieve this result with two basic changes to the language of the ADA. First, the definition of "disability" should be a "physical or mental impairment," with those terms defined as they have been for years by the regulatory agencies. While this obviously changes the *words* of the original ADA, it does not change the *intent* of Congress in terms of coverage under the law. As I explain above, it was understood and expected during passage of the ADA that a person with any type of impairment, even a minor one, would be covered under the third prong of the definition *if* the person could prove that he or she had been subjected to adverse action *because of* that physical or mental impairment. Indeed, it was *based* on this assumption of broad coverage that Congress chose to go with the long-standing definition of Section 504 of the Rehabilitation Act, rather than with the new definition offered by the National Council of Disability that had been incorporated into the first version of the ADA.[97] The rejection of that new definition was not because Congress thought the definition was too broad. Rather, it was because Congress *agreed* that such breadth was necessary—and believed it was *already encompassed* under the third prong of the definition.[98]

Changing the ADA in this manner would bring it into conformity with Title VII of the Civil Rights Act of 1964. Under that law, *every* person in this country is covered, since every person has a race, a sex, a religion (or lack of a religion), and a national origin. And any individual may believe that he or she has been discriminated against because of his or her race, sex, religion, or national origin. But under our system of law, an individual claiming discrimination on any of these grounds must prove that the discrimination occurred *because of* the prohibited characteristic and could not be explained based on a legitimate non-discriminatory reason. This same body of law would apply to individuals arguing discrimination on the basis of disability.

Second, the ADA should be modified so that the employment section prohibits discrimination "on the basis of disability," rather than the existing formulation that prohibits discrimination "against a qualified individual with a disability." This change would again bring the ADA into conformity with Title VII of the Civil Rights Act of 1964, which similarly prohibits discrimination "on the basis of" race, sex, religion, and national origin. This formulation ensures that courts will begin their analysis by focusing on whether a person has proven that a challenged discriminatory action was taken *because of* a personal characteristic—in this case, disability—and not on whether the person has proven the existence of various complicated elements of the characteristic.[99]

S. 1881, the Americans with Disabilities Act Restoration Act, would make these changes in the law. I believe this bill is an appropriate and justified response by Congress to the judicial narrowing of coverage under the ADA and would provide the essential protection needed by those who experience discrimination in our country today.

Thank you.

---

[96] National Council on Disabilities, Righting the ADA, Executive Summary, 13 (2004), *available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm*.

[97] S. 2345, 100th Cong., 2d Sess., 134 Cong. Rec. S5089 (daily ed. Apr. 28, 1988).

[98] *See* Feldblum, *Definition of Disability, supra* note 19, at 126–129.

[99] Such a change would not change the right of an employer to defend a claimed discriminatory action on the grounds that a particular applicant or employee does not have the requisite qualifications for the job. The four-part test set forth by the Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) for a plaintiff's *prima facie* case of discrimination under title VII would continue to apply to individuals bringing cases under the ADA. Under this test, a plaintiff must present evidence that he or she is a member of a class protected by the law; that he or she was subjected to an adverse employment action; that the employer treated similarly situated employees who were not members of the protected class more favorably; *and that the plaintiff was qualified to perform the required functions of the job. Id.* at 802. Thus, a basic level of qualification is already necessary to meet the threshold of establishing a *prima facie* case under title VII and would apply as well under the ADA. To the extent that an employer wishes to impose affirmatively a qualification standard that will screen out, or will tend to screen out, persons with disabilities, the ADA permits an employer to do so if such standards are job-related and consistent with business necessity. *See* 42 U.S.C. § 12112(b)(6) and § 12113(a) (2007). This defense on the part of the employer would not be changed by the suggested changes to the general employment section.

APPENDIX A.—PEOPLE COVERED UNDER SECTION 504 OF THE REHABILITATION ACT VS. PEOPLE NOT COVERED UNDER THE ADA

When writing the Americans with Disabilities Act (ADA), Congress borrowed the definition of "disability" from the Rehabilitation Act of 1973. (Originally noted as "handicap."[1]) For 15 years, the courts had generously interpreted this definition to cover a wide range of physical and mental impairments. Below is a sampling of people that courts held were "disabled" under the Rehabilitation Act based on their impairments. The courts tended to decide questions of coverage quickly and easily, without extensive analysis.

Epilepsy.—Person with epilepsy "disabled": *Reynolds* v. *Brock*, 9th Cir. 1987.

Diabetes.—Person with diabetes "disabled": *Bentivegna* v. *U.S. Dep't of Labor*, 9th Cir. 1982.

Intellectual & Developmental Disabilities*.—Person with intellectual and developmental disabilities "disabled": *Flowers* v. *Webb*, E.D.N.Y. 1983.

Bipolar Disorder.—Person with bipolar disorder "disabled": *Gardner* v. *Morris*, 8th Cir. 1985.

Multiple Sclerosis.—Person with multiple sclerosis "disabled": *Pushkin* v. *Regents of Univ. of Colorado*, 10th Cir. 1981.

Hard of Hearing.—Person who used hearing aid "disabled": *Strathie* v. *Dep't of Transp.*, 3rd Cir. 1983.

Vision in Only One Eye.—Person with vision in only one eye "disabled": *Kampmeier* v. *Nyquist*, 2d Cir. 1977.

Post-Traumatic Stress Disorder.—Person with PTSD "disabled": *Schmidt* v. *Bell*, E.D. Pa. 1983.

Heart Disease.—Person with heart disease "disabled": *Bey* v. *Bolger*, E.D. Pa. 1982.

Depression.—Person with depression "disabled": *Pridemore* v. *Rural Legal Aid Soc'y*, S.D. Ohio 1985.

HIV Infection.—Person with HIV infection "disabled": *Local 1812, Am. Fed'n of Gov't Employees* v. *U.S.*, D.D.C. 1987.

Asthma.—Person with asthma "disabled": *Carter* v. *Tisch*, 4th Cir. 1987.

Asbestosis.—Person with asbestosis "disabled": *Fynes* v. *Weinberger*, E.D. Pa. 1985.

Back Injury.—Person with back injury "disabled": *Schuett Inv. Co.* v. *Anderson*, Minn. Ct. App. 1986.

PEOPLE NOT COVERED UNDER THE ADA

Congress expected the definition of "disability" would be interpreted the same way under the ADA as it had been interpreted under the Rehabilitation Act. But instead of following Congress' expectations, the courts have read the definition in a strict and constrained way. Below is a sampling of people that courts have considered to be **not "disabled"** under the ADA. In contrast to cases decided under the Rehabilitation Act, these courts have often devoted pages of contorted analysis to arrive at their conclusions.

Epilepsy.—Person with epilepsy not "disabled": *Todd* v. *Academy Corp.*, S.D. Tex. 1999.

Diabetes.—Person with diabetes not "disabled": *Orr* v. *Wal-Mart Stores, Inc.*, 8th Cir. 2002.

Intellectual & Developmental Disabilities*.—Person with intellectual and developmental disabilities not "disabled": *Littleton* v. *Wal-Mart Stores, Inc.*, 11th Cir. 2007.

Bipolar Disorder.—Person with bipolar disorder not "disabled": *Johnson* v. *North Carolina Dep't of Health and Human Servs.*, M.D.N.C. 2006.

Multiple Sclerosis.—Person with multiple sclerosis not "disabled": *Sorensen* v. *University of Utah Hosp.*, 10th Cir. 1999.

Hard of Hearing.—Person who used hearing aid not "disabled": *Eckhaus* v. *Consolidated Rail Corp.*, D.N.J. 2003.

Vision in Only One Eye.—Person with vision in one eye not "disabled": *Albertson's, Inc.* v. *Kirkingburg*, U.S. 1999.

Post-Traumatic Stress Disorder.—Person with PTSD not "disabled": *Rohan* v. *Networks Presentations LLC*, 4th Cir. 2004.

Heart Disease.—Person with heart disease not "disabled": *Epstein* v. *Kalvin-Miller Intern., Inc.*, S.D.N.Y. 2000.

---

[1] What the court terms "mental retardation."

* What the court terms "mental retardation."

Depression.—Person with depression not "disabled": *McMullin* v. *Ashcroft*, D. Wyo. 2004.

HIV Infection.—Person with HIV infection not "disabled": *Cruz Carrillo* v. *AMR Eagle, Inc.*, D.P.R. 2001.

Asthma.—Person with asthma not "disabled": *Tangires* v. *Johns Hopkins Hosp.*, D. Md. 2000.

Asbestosis.—Person with asbestosis not "disabled": *Robinson* v. *Global Marine Drilling Co.*, 5th Cir. 1996.

Back Injury.—Person with back injury not "disabled": *Wood* v. *Crown Redi-Mix, Inc.*, 8th Cir. 2003.

BACKGROUND INFO FOR PEOPLE COVERED UNDER REHAB ACT AND ADA

The Rehabilitation Act originally referred to people covered under the act as "handicapped" individuals. This changed in 1992, when the act was amended to cover individuals with "disabilities." Pub. L. No. 102–569.

A statement of Congress' expectations with regard to the definition of "disability" under the ADA is nicely captured in: Steny H. Hoyer, *Not Exactly What We Intended Justice O'Connor*, WASH. POST, Jan. 20, 2002, at B01.

PEOPLE COVERED UNDER SECTION 504 OF THE REHABILITATION ACT

Epilepsy: *Reynolds* v. *Brock*, 815 F.2d 571, 574 (9th Cir. 1987).

Diabetes: *Bentivegna* v. *U.S. Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982).

Intellectual & Developmental Disabilities ("mental retardation"): *Flowers* v. *Webb*, 575 F. Supp. 1450, 1456 (E. D. N.Y. 1983).

Bipolar Disorder: *Gardner* v. *Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985).

Multiple Sclerosis: *Pushkin* v. *Regents of Univ. of Colorado*, 658 F.2d 1372, 1377, 1387 (10th Cir. 1981).

Hard of Hearing: *Strathie* v. *Dep't of Transp.*, 716 F.2d 227, 230 (3rd Cir. 1983).

Vision in Only One Eye: *Kampmeier* v. *Nyquist*, 553 F.2d 296, 299 n.7 (2d Cir. 1977).

Post-Traumatic Stress Disorder: *Schmidt* v. *Bell*, No. 82–1758, 1983 WL 631, at *10 (E.D. Pa. 1983).

Heart Disease: *Bey* v. *Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982).

Depression: *Pridemore* v. *Rural Legal Aid Soc'y*, 625 F. Supp. 1180, 1185–86 (S.D. Ohio 1985).

HIV Infection: Local 1812, *Am. Fed'n of Gov't Employees* v. *U.S.*, 662 F. Supp. 50, 54 (D.D.C. 1987).

Asthma: *Carter* v. *Tisch*, 822 F.2d 465, 466 (4th Cir. 1987).

Asbestosis: *Fynes* v. *Weinberger*, 677 F. Supp. 315, 321 (E.D. Pa. 1985).

Back Injury: *Schuett Inv. Co.* v. *Anderson*, 386 N.W. 2d 249, 253 (Minn. Ct. App. 1986).

PEOPLE NOT COVERED UNDER THE ADA

Epilepsy: *Todd* v. *Academy Corp.*, 57 F. Supp. 2d 448, 452–54 (S.D. Tex. 1999).

Diabetes: *Orr* v. *Wal-Mart Stores, Inc.*, 297 F.3d 720, 724–25 (8th Cir. 2002).

Intellectual & Developmental Disabilities ("mental retardation"): *Littleton* v. *Wal-Mart Stores, Inc.*, No. 05–12770, 2007 WL 1379986, at *2–4 (11th Cir. 2007).

Bipolar Disorder: *Johnson* v. *North Carolina Dep't of Health and Human Servs.*, 454 F. Supp. 2d 467, 473–74 (M.D.N.C. 2006).

Multiple Sclerosis: *Sorensen* v. *University of Utah Hosp.*, 194 F.3d 1084, 1087–89 (10th Cir. 1999).

Hard of Hearing: *Eckhaus* v. *Consolidated Rail Corp.*, No. Civ. 00–5748 (WGB), 2003 WL 23205042, at *8–10 (D.N.J. 2003).

Vision in Only One Eye: *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 562–67 (1999).

Post-Traumatic Stress Disorder: *Rohan* v. *Networks Presentations* LLC, 375 F.3d 266, 273–78 (4th Cir. 2004).

Heart Disease: *Epstein* v. *Kalvin-Miller Intern., Inc.*, 100 F. Supp. 2d 222, 224–29 (S.D.N.Y. 2000).

Depression: *McMullin* v. *Ashcroft, 337 F. Supp. 2d 1281, 1294–99 (D. Wyo. 2004).*

HIV Infection: *Cruz Carrillo* v. *AMR Eagle, Inc.*, 148 F. Supp. 2d 142, 144–46 (D.P.R. 2001).

Asthma: *Tangires* v. *Johns Hopkins Hosp.*, 79 F. Supp. 2d 587, 594–96 (D. Md. 2000).

Asbestosis: *Robinson* v. *Global Marine Drilling Co.*, 101 F.3d 35, 36–37 (5th Cir. 1996).

Back Injury: *Wood* v. *Crown Redi-Mix, Inc.*, 339 F.3d 682, 685–86 (8th Cir. 2003).

APPENDIX B.—THE EFFECT OF THE SUPREME COURT'S DECISIONS ON AMERICANS WITH DISABILITIES

The following stories illustrate many of the problems that the Supreme Court has created for people with disabilities who seek protection from disability discrimination in employment. Through a series of decisions interpreting the Americans with Disabilities Act of 1990 ("ADA"), the Supreme Court has narrowed the law in ways that Congress never intended. First, in a trio of decisions decided in June 1999, the Supreme Court ruled that mitigating measures—medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment—must be considered in determining whether an individual has a disability under the ADA.[1] This means people with serious health conditions who are fortunate enough to find a treatment that makes them more capable and independent—and more able to work—often find that they are not protected by the ADA at all. Next, in a 2002 decision, the Supreme Court emphasized that courts should interpret the definition of "disability" strictly in order to create a demanding standard for qualifying as disabled.[2]

In the wake of these restrictive rulings, individuals who Congress intended to protect—people with epilepsy, diabetes, cancer, HIV, mental illness—have been denied protection from disability discrimination. Either, the courts say, the person is impaired but not impaired enough to substantially limit a major life activity (like walking or working), or the impairment substantially limits something—like liver function—that does not qualify as a "major life activity." Courts even deny ADA protection when the employer freely admits it terminated someone's employment because of their disability. This has resulted in an absurd Catch–22 where an employer may say a person is "too disabled" to do the job but not "disabled enough" to be protected by the law. This is not what Congress intended.

Congress never intended to exclude people like Charles Irvin Littleton, Jr., Mary Ann Pimental, Carey McClure, Stephen Orr, or James Todd. Their stories are among those collected below, which demonstrate the problem created by the courts' misinterpretation of the definition of disability. These stories make it clear this problem is not limited to a single judge, employer, or geographic area. This is a nationwide problem that requires an appropriate congressional fix.

State: Alabama
Disability: Intellectual & Developmental Disabilities
Courts: 11th Circuit 2007 (AL, FL, GA)

CHARLES IRVIN LITTLETON, JR.

Charles Littleton is a 29-year-old man who was diagnosed with intellectual and developmental disabilities* as a young child.

A high school graduate with a certificate in special education, Charles lives at home with his mother and receives social security benefits.[3] In an effort to work, Charles has been a client of several State agencies and public service organizations, including the Alabama Independent Living Center, that provide vocational assistance to people with disabilities.[4]

In 2003, Charles' job counselor at the Independent Living Center helped Charles get an interview for a position as a cart-pusher at a local Wal-Mart store in Leeds, Alabama.[5] The job counselor asked Wal-Mart if she could accompany Charles in his interview, and Wal-Mart's personnel manager agreed. When they got to the store, however, the job counselor was not allowed into the interview. The interview did not go well for Charles and Wal-Mart refused to hire him. According to Wal-Mart, he was not hired because he displayed "poor interpersonal skills" and a lack of "enthusias[m] about working at Wal-Mart."[6]

Charles felt that he had been discriminated against based on Wal-Mart's refusal to allow his job counselor to accompany him in the interview as previously agreed,

---

*"Intellectual and developmental disabilities" are preferred terms in the disability community. The term "mental retardation" is used in this description only in direct quotes from the court's opinion.

and decided to file a claim under the ADA. But no court ever reached the question of whether Charles was qualified for the job, whether Wal-Mart discriminated against Charles because of his disability, or whether Wal-Mart violated the law by not modifying its policies to allow a job counselor to accompany Charles. Instead, the courts simply ruled that Charles Littleton *was not "disabled"* under the ADA:

> We do not doubt that Littleton has certain limitations because of his mental retardation. In order to qualify as "disabled" under the ADA, however, Littleton has the burden of proving that he actually is . . . substantially limited as to "major life activities" under the ADA.[7]

Noting the Supreme Court's "demanding standard for qualifying as disabled,"[8] the courts found that "there is no evidence to support Littleton's necessary contention that his retardation substantially limits him in one or more major life activities."[9]

Charles first tried to show that he was substantially limited in the major life activities of thinking, learning, communicating, and social interaction. Charles explained that:

- his cognitive ability is (according to his job counselor) comparable to that of an 8-year-old[10];
- he needed a job counselor during the interview process and on the job with him after hiring, until he became familiar with the routine[11];
- his own testimony demonstrated "difficulty thinking and communicating" as the courts, themselves, acknowledged[12];
- the reason Wal-Mart's personnel manager originally agreed to allow Charles' job counselor to accompany him to his interview was precisely because of his difficulty communicating and interacting with others[13]; and
- according to the Supreme Court: "[c]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction . . . [People with mental retardation] *by definition* . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[14]

The courts were not persuaded.

"It is unclear whether thinking, communicating and social interaction are 'major life activities' under the ADA," the Court of Appeals for the 11th Circuit stated.[15] Even assuming that they are, the court relied on Charles' ability to drive a car as evidence that Charles was not substantially limited in his ability to think. In addition, the appellate court found that "[a]ny difficulty Littleton has with communicating does not appear to be a substantial limitation" since Charles' mother and job counselor testified that, among other things, Charles is "very verbal."[16]

The court acknowledged that Charles "is somewhat limited in his ability to learn because of his mental retardation," but concluded that this did not *substantially* limit his ability to learn. According to the appellate court, "Littleton is able to read and comprehend and perform various types of jobs."[17]

Charles also tried to show that he was substantially limited in the major life activity of working. He explained that he receives social security disability benefits, which are granted only to those who are unable to work by reason of a medically determinable physical or mental impairment. He also explained that the only jobs that he ever held involved stocking shelves at supermarkets, custodial work, and a summer job as a recreational aide. He required application assistance and a job coach for all of them.[18] The appellate court concluded that while Charles was not hired for the cart-pusher job, there were other jobs he could do and, therefore, he was not substantially limited in his ability to work.[19]

State: Texas
Disability: Epilepsy
Court: Southern District Texas 1999

JAMES TODD

James Todd has lived with epilepsy since he was 5 years old. While medication helps to minimize the duration and intensity of his seizures, it does not cure his epilepsy—he still has seizures about once a week. His seizures follow a familiar pattern, beginning with a tingling sensation that signals the onset of a seizure. During a seizure, which can last anywhere from 5 to 15 seconds, James is unable to speak, the left side of his body shakes involuntarily, and his thinking becomes clouded. James removes himself from the company of others as soon as he feels a seizure coming on, and lies down until the seizure is over.[20]

In September of 1996, sporting goods giant Academy Corporation hired James as a stocking clerk, whose job it was to inventory and stock merchandise. James made approximately $5.00/hour on the job. Several weeks into the job, James had his first seizure at work, told his supervisors he had epilepsy, and explained how to respond if he had a seizure at work.[21]

Five months later, after James had been out sick with a stomach flu for 5 consecutive days, Academy fired him. Although James had notified his supervisor of his illness and absence each day, as required by the company's written work policy, Academy told him that he had violated an "unwritten policy" that prohibits taking more than 3 consecutive days off without sick leave or vacation leave, when the FMLA does not cover the situation. James decided to challenge Academy's decision to fire him, and filed a complaint under the ADA.[22]

The district court never reached the question of whether James had been fired because of his epilepsy. Instead, the court concluded that since James was able to manage his seizures with medication, *he was not disabled enough to claim protection under the ADA in the first place*.[23]

Had James Todd's case been decided just 2 months earlier, before the Supreme Court's decision in *Sutton* v. *United Airlines*, James would have received protection under the ADA. As the district court noted, before *Sutton,*

> epilepsy would, without question, be considered a substantial limitation on several major life activities, and a person suffering from epilepsy would receive nearly automatic ADA protection.[24]

However, after *Sutton*, the court explained that it needed to consider whether James was substantially limited in a major life activity after taking into account how well James' epilepsy medication worked for him. Under that analysis, James was not disabled: "[e]xcept for a time period of 15 seconds per week, [James] is able to work, walk, talk, think and learn" and thus "cannot be considered 'disabled' under the ADA."[25] The fact that James lay shaking on the floor and unable to talk for 15 seconds per week amounts to "only" a "momentary physical limitation[] which could not be classified as substantial."[26]

State: New Hampshire
Disability: Breast Cancer
Court: New Hampshire District Court 2002

MARY ANN PIMENTAL

Mary Ann Pimental was a registered nurse who lived in Hudson, New Hampshire with her husband and two children and worked in a hospital. Five years into her job as a staff nurse, the hospital promoted Mary Ann to its nurse management team. A little more than a year later, Mary Ann was diagnosed with stage III breast cancer.[27]

Mary Ann initially took time from work to undergo surgery (mastectomy) and follow-up treatment (chemotherapy and radiation therapy). While Mary Ann was hospitalized and receiving treatment for cancer, the hospital reorganized its management team and eliminated Mary Ann's position. When Mary Ann was able to return to work, she applied for several different positions but was not hired. The hospital finally rehired her into a staff nurse position that provided only 20 hours of work each week. As a result, Mary Ann was not eligible for higher benefits offered to employees working 30 or more hours each week.[28]

Given her strong work history, and because she was asked about her ongoing cancer treatments and ability to handle work with the stress of battling cancer, Mary Ann believed that the hospital failed to rehire her into a better position because of her breast cancer. She decided to challenge these decisions, and filed a claim under the ADA.[29]

The hospital argued that she wasn't protected by the ADA because she didn't have a "disability."[30]

So Mary Ann provided highly personal, sometimes embarrassing, evidence to her employer and the courts of how her impairment—breast cancer—impacted her life in a severe and substantial way. That impact included:

- hospitalization for a mastectomy, chemotherapy, and radiation therapy;
- problems concentrating, memory loss, extreme fatigue, and shortness of breath;
- premature menopause brought on by chemotherapy, and burns from radiation therapy;
- problems in her shoulder resulting in an inability to lift her left arm over her head;
- sleep-deprivation caused by nightmares about dying from the cancer;

• difficulty in intimate relations with her husband because of premature menopause and Mary Ann's discomfort and self-consciousness following the mastectomy; and
• the need for assistance from her husband and mother in order to care for herself and for the couple's two children because of extreme fatigue, and difficulties performing basic tasks like climbing stairs or carrying household items.[31]

When Mary Ann returned to work she still was undergoing radiation therapy and experiencing fatigue. She still could not lift her arm above her head, still experienced concentration and memory problems, and still received help at home from her husband and mother.[32]

The district court never reached the question of whether Mary Ann's breast cancer played a role in her failure to be rehired into a better management position. Instead, the court agreed with the hospital that "the most substantial side effects [of Mary Ann's breast cancer and treatment] were (relatively speaking) short-lived" and therefore "they did not have a substantial and lasting effect on the major activities of her daily life."[33] Because MaryAnn failed to show she was limited by the breast cancer on a "permanent or long-term basis," she was held not to have a "disability" under the ADA.[34]

The district court also relied on Mary Ann's assertions that her cancer "did not substantially impair her ability to perform various tasks associated with her employment." This assertion, according to the court, undermined Mary Ann's claim that the cancer had substantially affected her ability to care for herself on a long-term basis.[35]

Mary Ann Pimental died of breast cancer 4 months after the court issued this decision.

State: Nebraska
Disability: Diabetes
Court: 8th Circuit 2002 (AR, IA, MN, MO, NE, ND, SD)

STEPHEN ORR

Stephen Orr was a pharmacist at Wal-Mart in Chandron, Nebraska, a town of 6,000 nestled in the rural northwestern part of the State. Stephen was hired in early 1998. During his interview, he told his soon-to-be boss that he had diabetes and needed to take regular, uninterrupted lunch breaks. Stephen was authorized to take a 30-minute lunch break during his 10-hour work shift.[36]

Doctors diagnosed Stephen with diabetes in 1986. He requires multiple injections of insulin daily and uses a device called a glucometer to monitor his blood sugar levels. In order to keep his blood sugar stable, Stephen follows a regimented diet, monitoring what and when he eats in coordination with his medication regimen. If he does not, he experiences episodes of either hypoglycemia (low blood sugar) or hyperglycemia (high blood sugar).[37]

When his blood sugar levels are not in his target range, Stephen experiences:

- seizures;
- deteriorated vision;
- trouble talking;
- the need to urinate frequently;
- loss of consciousness;
- lack of physical strength and energy;
- coordination problems;
- difficulty reading or typing; and
- impaired concentration and memory.[38]

Complications caused by fluctuating blood sugar levels can, and have, resulted in hospitalization.[39]

After he started working, Stephen took lunch breaks as agreed, closing the pharmacy to eat without being interrupted.[40] During this time, Stephen did not experience severe hypoglycemia and performed his job well.[41] No one complained about the pharmacy being closed for the half hour that Stephen was taking lunch.

When a new district manager took over, he told Stephen to stop closing the pharmacy, and to eat lunch whenever possible during down times in the pharmacy.[42]

Stephen obeyed this order, but started having problems with low blood sugar because he was no longer able to control the times that he ate. Stephen told his new boss that, because of the no-lunch-break order, he had experienced several hypoglycemic incidents and that he needed to resume his noon lunch breaks to control his blood sugar. Stephen's boss continued to deny the request for a lunch break and ultimately fired him.[43]

Stephen decided to challenge his firing and filed a claim against Wal-Mart under the ADA.

Wal-Mart responded that Stephen did not have a "disability" because Stephen was able to manage his diabetes with insulin and diet.[44]

The courts agreed. Because the Supreme Court directed courts to consider "mitigating measures" in deciding whether an individual has a disability, the Court of Appeals for the 8th Circuit found that Stephen did so well managing his condition that he was not disabled enough to be protected by the ADA.[45]

Wal-Mart's refusal to allow Stephen to take a lunch break was never questioned.

Although Wal-Mart vigorously defended its refusal to allow Stephen a lunch break, Wal-Mart voluntarily changed company policy in 2000 to allow one-pharmacist pharmacies to close for 30 minutes at lunch because of "retention" problems.[46]

State: Texas
Disability: Muscular Dystrophy
Court: 5th Circuit 2003 (LA, MS, TX)

CAREY MCCLURE

Since age 15, Carey McClure has had a form of muscular dystrophy that affects the muscles in his upper arms and shoulders. Carey has difficulty raising his arms above shoulder level and has constant pain in his shoulders. In his work as a professional electrician, Carey performs most of his job functions without modification, and has adapted how he performs overhead tasks like changing light fixtures or working on ceiling wiring. Carey performs these job functions by (a) throwing his arms over his head to perform the work, (b) repositioning his body so that he can raise his arms, (c) supporting his arms on an adjacent ladder, or (d) using a ladder, step-stool, or hydraulic lift so that it is not necessary for him to raise his arms above shoulder level.[47]

Carey was living in Georgia and had 20 years of experience working as an electrician when he applied for a better opportunity at a General Motors' assembly plant in Arlington, Texas. GM offered Carey the job pending completion of a preemployment physical examination. During that exam, GM's physician asked Carey to raise his arms above his head. When he saw that Carey could only get his arms to shoulder level, the physician asked how Carey would perform overhead work. Carey, who had performed such work in the past, responded that he would use a ladder. Despite the fact that other electricians in the plant often used ladders or hydraulic lifts to do overhead work, the physician revoked GM's offer of employment.[48]

Carey challenged GM's decision. Eventhough GM revoked its job offer because of limitations resulting from Carey's muscular dystrophy,[49] GM argued that Carey did not have a "disability" and was not protected by the ADA.[50]

Carey responded with highly personal information regarding the many ways that his muscular dystrophy limits his daily life activities. Carey explained that:

- he is able to wash his hair, brush his teeth, and comb his hair only by supporting one arm with the other;
- he wears button down shirts because it is too difficult for him to pull a t-shirt over his head;
- he must rest his elbows on the table in order to eat, and lowers his head down over the plate so that he can get the food to his mouth;
- he cannot exercise or play sports, and cannot care for his grandchildren by himself; and
- his ability to engage in sexual activities is limited by his muscular dystrophy.[51]

GM argued that—because Carey had adapted so well—he was not substantially limited in any major life activity.[52]

The courts agreed. According to the Court of Appeals for the 5th Circuit,

> [Carey] has adapted how he bathes, combs his hair, brushes his teeth, dresses, eats, and performs manual tasks by supporting one arm with the other, repositioning his body, or using a step-stool or ladder. . . . [Carey's] ability to overcome the obstacles that life has placed in his path is admirable. In light of this ability, however, we cannot say that the record supports the conclusion that his impairment substantially limits his ability to engage in one or more major life activities.[53]

Because the courts found that Carey did not have a "disability," GM's decision to revoke his offer because of limits resulting from his muscular dystrophy was never questioned.

State: Utah
Disability: Multiple Sclerosis
Court: 10th Circuit 1999 (CO, KS, NM, OK, UT, WY)

LAURA SORENSEN

Laura Sorensen started working as a clinical nurse for the University of Utah Hospital in 1990. A year later, the Hospital hired her to work as a flight nurse for its helicopter ambulance service.[54]

Two years into her dream job, Laura was diagnosed with multiple sclerosis and hospitalized for 5 days.

Laura's physician cleared her to return to work within 2 weeks, but Laura's supervisors initially refused to allow her to return as a flight nurse. Laura agreed to return as a regular nurse for an evaluation period, during which time she worked successfully in the burn unit, the surgical intensive care unit, and emergency room. After a 2-month evaluation period, a neurologist examined Laura and cleared her to return to work as a flight nurse.[55]

Laura's AirMed supervisor still refused to allow Laura to return in the flight nurse position because the neurologist could not *guarantee* that Laura would never experience symptoms related to her multiple sclerosis while on duty. Laura's AirMed supervisor felt that this justified his decision to keep Laura grounded indefinitely.[56]

Laura continued working for the Hospital for a few more months, resigning after it became clear that she would never be allowed to work as a flight nurse.[57]

Laura believed, consistent with her evaluating neurologist, that she could perform the flight nurse job safely. Because she felt that she was demoted because of unjustified fears about her disability, Laura decided to challenge the Hospital's decision.[58]

The Hospital responded that Laura's multiple sclerosis did not qualify as a "disability" under the ADA, eventhough it was the sole reason that Laura was barred from working as a flight nurse.

The courts agreed.[59]

According to the Court of Appeals for the 10th Circuit, eventhough Laura "could not perform any life activities during her hospitalization," her hospital stay had not been permanent or long-term enough to qualify Laura as disabled under the ADA.[60] And eventhough the Hospital based its decision on Laura's multiple sclerosis, its refusal to hire her in the "single job" of flight nurse was not enough to show that it regarded her as disabled.[61]

In an interview with the *Salt Lake Tribune* following the court's dismissal of her case, Laura explained that "[t]he university took a red paintbrush and put a scarlet 'MS' on my forehead. I was a disease from that point on. I can do that job—that's the bottom line."[62]

Laura proved this point by leaving Utah briefly to work as a flight nurse in Arizona. Upon her return to Utah, Laura won the Utah Emergency Room Nurse of the Year Award,[63] but still has not been allowed to work as a flight nurse in her home State.

State: Florida
Disability: Epilepsy
Courts: 11th Circuit 2001 (AL, FL, GA)

CHARLOTTE CHENOWETH

Charlotte Chenoweth is a registered nurse from rural Florida with over 15 years of nursing experience. In 1995, Charlotte started working for the county health department, where she reviews the files of hospital patients for whom the County is financially responsible.[64]

Two years into her job with the county, Charlotte had a seizure and was diagnosed with epilepsy. Her doctor put Charlotte on an anti-seizure medication and advised her not to use a stove or bathe alone, and not to drive until she had gone 6 months without another seizure.[65] Charlotte's anti-seizure medication also increases the risks of having a child with birth defects, and Charlotte decided not to have children as a result.[66]

During the 6-month period after starting anti-seizure medication, Charlotte asked the health department if she could do document review work from home for 2 days per week as she and others had done in the past or, alternatively, if her hours could be varied slightly to allow friends and family to drive her to work.[67] The health department refused. Believing that her requests were reasonable, Charlotte decided to challenge the county's decisions.[68]

The county initially agreed that epilepsy is a disability under the ADA. But, while Charlotte's case was still pending, the Supreme Court issued its 1999 "mitigating measures" decisions, and the county retracted this admission. Following those decisions, the county started arguing that Charlotte's epilepsy did not qualify as a "disability" and that she was not protected by the ADA at all.[69]

The courts agreed. Eventhough Charlotte had been unable to cook, bathe by herself, or drive until she had gone 6 months without a seizure, the Court of Appeals for the 11th Circuit found that Charlotte was not "disabled" because none of these activities are "major life activities" under the ADA. Though it recognized that having children is a major life activity, the court refused to consider whether Charlotte had a "disability" because of limitations on her ability to have children due to the increased risk of birth defects from her anti-seizure medication. The court dismissed this evidence that Charlotte meets the ADA's definition of "disability" as irrelevant to her work for the county.[70]

State: Wyoming
Disability: Depression
Court: D. Wyoming 2004

MICHAEL MCMULLIN

Michael McMullin has lived and worked as a law enforcement officer in Wyoming his entire adult life. In 1973, he started his career as an officer with the Casper, Wyoming Police Department. Thirteen years into that job, Michael started experiencing symptoms of depression, including insomnia and severe sleep deprivation. After struggling with these symptoms for a few years—during which he periodically got only 2–3 hours of sleep a night—Michael became suicidal and sought medical leave and assistance. His physician referred him to a psychiatrist, who diagnosed Michael with clinical depression and prescribed medication to treat his depression, insomnia, and sleep deprivation. This treatment controlled Michael's symptoms and he was able to return to work after 5 months of medical leave.[71]

Michael stayed with the Casper Police Department for another 8 years, receiving numerous awards and commendations. In 1996, Michael left Casper and moved to Cheyenne, Wyoming where he was hired by the Capitol Police Department to provide security and protection to the Wyoming Governor and First Family. At the time of his hiring, Michael told the Capitol Police Department about his clinical depression, and asked that he not be assigned regularly to the graveyard shift. Michael successfully served as a security officer for the Governor for 5 years, until 2001, when he decided to apply for a job as a court security officer at the Federal building in Cheyenne.[72]

Michael again disclosed his clinical depression when he applied for employment and was assured that—as long as his depression was under control and treated with medication—it would not pose an obstacle to employment as a court security officer. Michael took the required pre-employment medical examination and answered questions about his medical history and use of medication. The examining physician found that Michael could perform the job without limitation, and Michael started working as a court security officer.[73]

Michael performed the job without any complaints from supervisors until another doctor reviewed his medical files and decided that he was "not medically qualified" because of his depression and use of medication.[74] Michael was suspended without pay, and was then medically disqualified from working as a court security officer. Michael filed an internal appeal, providing his previous employment evaluations—including those from the State of Wyoming—and letters from doctors stating that he was fully capable of performing law enforcement duties. After his internal appeal was denied, Michael decided to challenge his medical disqualification and filed claims of disability discrimination under the ADA and the Rehabilitation Act of 1973.[75]

After firing him because of his clinical depression, his employers argued that Michael's depression did not qualify as a "disability" under Federal law, eventhough it was the admitted basis for its termination decision.[76]

The court agreed.

Because Michael's medication successfully managed his symptoms, his depression was not disabling enough. With regard to his history of sleep deprivation and insomnia, the court decided that:

> Sleep deprivation which results in a plaintiff getting only 2–3 hours of sleep per night is not "severe" enough to constitute a substantial limitation on the major life activity of sleeping.[77]

As for limitations on his ability to work, the court found that—while he had been excluded from working as a court security officer—Michael was still able to perform other jobs and, therefore, was not substantially limited in his ability to work.[78] Eventhough his depression had prevented him from working in the past, the "5-month period in which [Michael] actually missed work in 1988 was of limited duration; this weighs against a finding of substantial limitation."[79] Finally, his employers had not "regarded" Michael as disabled because they had only barred him from "a single job rather than a class of jobs."[80]

Because "[t]he definition of disability is the same for claims under either the ADA or Rehabilitation Act," the court dismissed Michael's disability discrimination claims under both laws.[81] As a result, his employers' decision to rescind their initial medical clearance and to ignore Michael's 30 years of law enforcement experience went unchallenged.

The court recognized the unfairness of this result, but said that its hands were tied by current interpretations of the law, noting that: [t]his is one of the rare, but not unheard of, cases in which many of the plaintiff's claims are favored by equity, but foreclosed by the law.[82]

REFERENCES CITED

1. *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy* v. *United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).
2. *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 534 U.S. 184, 197 (2002).
3. *Littleton* v. *Wal-Mart Stores, Inc.*, No. 05–12770, 2007 WL 1379986, at *1 (11th Cir. May 11, 2007).
4. Brief for Appellant, 2005 WL 4720205, at *3 (No. 05–12770FF).
5. *Littleton,* 2007 WL 1379986, at *1; Brief for Appellant at *4.
6. Brief for Appellant at *29.
7. *Littleton,* 2007 WL 1379986, at *4.
8. *Id.* at *2 (quoting *Toyota Motor Mfg.* v. *Williams*, 534 U.S. 184, 197 (2002)).
9. *Id.*
10. Brief for Appellant at *8, *34.
11. *Id.* at *21.
12. *Littleton,* 2007 WL 1379986, at *3.
13. Brief for Appellant at *29.
14. *Id.* at *27 (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 318 (2002)) (emphasis added).
15. *Littleton,* 2007 WL 1379986, at *3.
16. *Id.* at *4.
17. *Id.*
18. Brief for Appellant at *34–35.
19. *Littleton,* 2007 WL 1379986, at *3.
20. *Todd* v. *Academy Corp.*, 57 F. Supp. 2d 448, 449–50 (S.D. Tex. 1999).
21. *Id.* at 450.
22. *Id.* at 450–51.
23. *Id.* at 454.
24. *Id.* at 452.
25. Id at 454.
26. *Id.* at 453–54.
27. *Pimental* v. *Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 179–80 (D.N.H. 2002).
28. *Id.* at 180.
29. *Id.* at 179–80, 186–87.
30. Brief for Defendant, 2002 WL 33016261 (No. CV–01–292–M).
31. *Pimental,* 236 F. Supp. 2d at 183–85; Brief for Defendant at ¶¶ 14–16.
32. Brief for Defendant at ¶¶ 14–16.
33. *Pimental,* 236 F. Supp. 2d at 183.
34. *Id.* at 184.
35. *Id.* at 183.
36. *On* v. *Wal-Mart Stores, Inc.*, 297 F.3d 720, 722 (8th Cir. 2002).
37. *Id.*
38. *Id.; Orr,* 297 F.3d at 726 (Lay, J. dissenting); Brief for Appellee, 2001 WL 34156010, at *15–16 (No. 01–2959).
39. *Orr,* 297 F.3d at 727 (Lay, J., dissenting).
40. *Id.* at 722.
41. Brief for Appellee at *11–12.

42. *Orr,* 297 F.3d at 722.
43. *Id.* at 723.
44. Brief for Appellee at *17.
45. *Orr,* 297 F.3d at 724.
46. *Id.* at 727 n.9 (Lay, J., dissenting); Brief for Appellee at *16, 44–45.
47. *McClure* v. *General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539, at *1–2 (5th Cir. 2003); Brief for Appellant, 2003 WL 22452651, at *4–5 (No. 03–10126).
48. *McClure,* 2003 WL 21766539, at *3; Brief for Appellant at *5–8.
49. Brief for Appellant at *7.
50. Brief for Appellee, 2003 WL 22452652, at *5 (No. 03–10126).
51. *McClure,* 2003 WL 21766539, at *1–2; Brief for Appellant at *2–5, 18–23.
52. Brief for Appellee at *6.
53. *McClure,* 2003 WL 21766539, at *2.
54. *Sorensen* v. *University of Utah Hosp.*, 194 F.3d 1084, 1085 (10th Cir. 1999).
55. *Id.*
56. *Id.* at 1085–86.
57. *Id.* at 1086.
58. *Id.*
59. *Id.* at 1088–89.
60. *Id.* at 1087–88.
61. *Id.* at 1089.
62. Sheila R. McCann, *Former Flight Nurse With MS Frustrated by Disability Ruling*, SALT LAKE TRIB., Apr. 6, 1998, at D1.
63. *Id.*
64. *Chenoweth* v. *Hillsborough County*, 250 F.3d 1328, 1329 (11th Cir. 2001).
65. *Id.*
66. *Id.*; Brief for Appellant, 2000 WL 33988759, at *4 (No. 00–10691–EE).
67. *Chenoweth,* 250 F.3d at 1329; Brief for Appellant at *5.
68. *Chenoweth,* 250 F.3d at 1329.
69. Brief for Appellant at *9 n. 1.
70. *Chenoweth,* 250 F.3d at 1329–30.
71. *McMullin* v. *Ashcroft*, 337 F. Supp. 2d 1281, 1287, 1297 (D. Wyo. 2004).
72. *Id.* at 1287–88.
73. *Id.* at 1288.
74. *Id.* at 1289.
75. *Id.* at 1289–90.
76. *Id.* at 1294.
77. *Id.* at 1297.
78. *Id.* at 1296.
79. *Id.* at 1297.
80. *Id.* at 1298.
81. *Id.* at 1294.
82. *Id.* at 1286.

Senator HARKIN. Thank you very much, Ms. Feldblum.

Thank you all very much for your testimonies. I think therein you have, sort of, the spectrum of arguments on it that I've heard thus far. Although, since we haven't really had too many hearings on it, we haven't been really able to flesh out, this being the first hearing, I'm sure we'll have more as we move ahead on this, either later this year or after the first of the year.

I'm going to ask Mr. Thornburgh, if I might. You've heard these arguments. Now, it seems to me and I'll go down the line, I wanted to read, again, the exact language, I paraphrased it earlier in the day. You know, we pass laws here, I've been doing this for 37 years, we pass a lot of laws in Congress, we don't put into every law every little jot and tiddle of everything it's supposed to cover. I mean, the U.S. Code is big enough as it is. If we did that, it will fill every library in this country.

So what we do is we pass laws that are fairly broad, but in order to give instructions to the Court, we give report language, that's why we have report language. We put in there to guide courts as to what we meant by that.

We said in the report language that, "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." Again, with that kind of language, I'm so baffled after all these years—and reading these court decisions, and the reasoning of the court—as to why they wouldn't take that into account. And I just wonder, Dick, if you could share any light on that, I'm wrestling with this.

We put it in there, the House put in similar language, I'm sorry, I don't have the House language, but it's basically pretty similar. That we just said that mitigating circumstances—I can't remember specifically. But I can sure remember all of the hearings and investigations and testimony that we had in those days, back in 1986, 1987, 1988, 1989, that there were cases of—there were times when people would, obviously, with the assistance of an aid—whether it was a wheelchair or a prosthetics or whatever it might be, could get a job. But we were still aware that they were being discriminated against on a daily basis. I think that, my memory serves me right, that's why we put that in there.

That's also why we put the language in, definition of disability, "As used in the ADA, the term disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such an individual," that's 504, "a record of such an impairment," or C, "Be regarded as having such an impairment." I remember, we wrestled for days, weeks, on that language. And, it was different than that from where we started, and we finally agreed on that language as being regarded as having such an impairment. And we put that in for a reason. Because, we knew that at times, people may not appear to be disabled. To the eye, to the ear, to casual observation and stuff, may not appear to be disabled in one or more activities, but are, nonetheless, regarded as being disabled.

As I read these cases, I start to wrestle with this, I'm wondering how, with all of this, could we have strayed so far to the point now where we have these Catch–22 situations. And later, I'm going to ask Ms. Olson to address some of those, as to how they might approach them.

I guess what I'm asking, it may be an impossible question, may be an impossible answer, is to help me think about, how did we get so far off of this rule, what could the Court have been thinking, and I guess from your testimony, you think that S. 1881 would be a proper response, is that what we have to do to get it back on track again?

Kind of a convoluted question, I guess.

Mr. THORNBURGH. Don't ask me to explain how the U.S. Supreme Court operates, in this or any other situation, Senator, I'm not privy—as you aren't—to their deliberations, in detail. It does seem to me as a lawyer, however, that reliance on legislative history is hardly a bizarre undertaking in the normal case. But you and I are both aware that there has been a back and forth on the U.S. Supreme Court for some time between those justices who put more or less emphasis on the use of legislative history.

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00071 Fmt 6633 Sfmt 6601 S:\DOCS\39388.TXT DENISE

I think you're right, I mean, you go to the well again, and lay it out in no uncertain terms, again, and I think that's about all that you can do. And I think that that's what this bill does.

I certainly don't think that the types of situations that have resulted in exclusion of persons from the coverage of the act—as I said in my testimony—were ever contemplated by those of us who were engaged in the storm and throng of debate that led up to the passage of the bill. You have to look at it this way, I think, why do we care if someone is covered by the ADA? Why do we care if they have a disability that is entitled to protection under the ADA?

It seems to me for two reasons. One is to protect them against discrimination. That if they're defined as having a particular disability and are discriminated against in the workplace, we're talking about, today, they're entitled to some relief.

Second, is that they're also entitled to have a reasonable accommodation made to that disability, an accommodation that doesn't place an undue burden on the employer, so that they can assume their place in the workforce, notwithstanding the fact that they have a disability. Those are two very crucial determinations that turn upon what the proper definition of a person with a disability is.

As I say, I think that by importing the definition from the long-utilized and well-recognized provisions of the Rehabilitation Act, that intention—to my view—could not have been made more clear. Obviously, for reasons unknown to you and me, the Court didn't agree, and that's why I think that you're embarked on a proper course to make these fine-tuning adjustments that restore the original intent that we all had.

Senator HARKIN. It almost seems to me that the Court is just kind of taking a standard that disabled means that you're not able to do anything. That's sort of the standard. You're disabled and you're not really able to do something, you're not really able to work. It concerns me that there's a theme in these cases that run through that, well, gee, you're able to work and do something else, I mean if you've got a job, that means you're not disabled but in some of these cases, it's the difference between a job that a person can get that provides them with some income, but it's not the job for which they are really, fully capable of doing and trained to do. They can't reach their full, maximum potential. It seems like the U.S. Supreme Court said, "Well, gee, if you can get a job bagging groceries, then you're not disabled." But with a reasonable accommodation, you can be a pharmacist.

It seems to me that's sort of what they're looking at, and I'm trying to wrestle with that. And I don't know, that's just sort of my reading of it, I don't know if that strikes a chord with you about that we seem to be thinking about it that way, that disabled just means, you're unable to do it. And that's not what we intended when we wrote the ADA. Our intent was, basically as you said, was to provide for the freedom for people with disabilities to reach their full maximum potential.

As we will get into the questions in a little bit, here it's not just proving a concern that you're disabled, you also have to be qualified.

Sometimes we forget that. There's nothing in the law that says you've got to hire someone just because they're disabled. You still have to be qualified for that position. A lot of times, we forget that.

Anyway, John Kemp, let me ask you. Ms. Olson said something about, and I've heard this before, that if we pass this bill, a person with headaches, things like that, will now be regarded as disabled, and they can file for protections under the ADA. How does that strike you?

Mr. KEMP. It strikes me as extreme, unfair, and I think the definition is pretty clear, if we use the one in the legislation that talks about a person with an impairment that substantially limits a major life activity. These don't rise to that level whatsoever.

Senator HARKIN. I assume that you would respond and say, "Well, that would be okay, but not under S. 1881," is that right Ms. Olson?

Ms. OLSON. The definition that was just described is the definition of the ADA. The definition in S. 1881 is just the showing that there is a mental or physical impairment, without regard whether that mental or physical impairment impacts an individual in such a way that any major life activity is substantially limited, for any particular duration.

Again, I think it's particularly important to focus on this, because where does the limitation exist, is S. 1881, in connection with who wouldn't be covered as somebody who is disabled.

Under S. 1881, having an impairment equates the person to be disabled. Exactly what you were saying, Senator Harkin, in terms of what you think that the courts are doing, with respect to interpretations of the ADA, that's exactly what S. 1881 does. It says, I don't want to know the functionality of the person. If I know that they have a condition, I'm labeling them disabled, without regard as to whether or not they are. And again, you have to look at it in the context where the ADA was passed without a question, with significant compromise and discussion between the business community, disability rights groups and others in this country. Part of the reason is because there are always limited resources in a workplace, and employers do have obligations to provide affirmative steps to assist disabled individuals in the workplace.

For example——

Senator HARKIN. Ms. Olson, C, "being regarded as having such an impairment." Being regarded.

Ms. OLSON. Yes.

Senator HARKIN. Mr. Orr was regarded. I mean, how do you—it's not that we say everybody's disabled or impaired, we say it, that we are regarded as such, whether or not they were or not, that is covered.

Ms. OLSON. I would love to address for just a moment, Mr. Orr's situation, if I may.

Senator HARKIN. Sure.

Ms. OLSON. With respect to Mr. Orr, unfortunately, his attorney and his complaint in the case did not bring to the court any allegation that the impairment that he had adversely affected any major life function.

To make it very clear for this committee, his complaint didn't include the allegation that he was substantially limited in the major

life activity of eating. It was a procedural decision. It doesn't describe a defect of the Americans with Disabilities Act, it describes a defect with the pleading and the litigation that occurred in the case.

I'll give you another example, Senator Harkin. Had Mr. Orr's attorney not filed the lawsuit until 95 days after receiving a notice of Right to Sue, 5 days later in the procedural time limit, in terms of filing that complaint, he also would not have had a successful complaint. Yet, no one could argue that that's a problem with the Americans with Disabilities Act. It was a procedural issue that was missed.

In that particular case, even the dissent, notwithstanding that particular issue being raised, it was a 2 to 1 decision, that perhaps we ought to look beyond it, and look at the facts that are being raised at the 8th Circuit.

Mr. Orr lost that case, not because he was regarded as disabled. In that case, initially, the employer assumed that, or made the determination that, in fact, in terms of his day-to-day work, he was going to be entitled to a reasonable accommodation, implemented it, and then at some point made the determination—which we may disagree with or agree with. But, in fact, it was an undue hardship for the employer to continue to close the pharmacy, because there was only one pharmacist on duty during that lunch hour, when most people were coming in to fill prescriptions.

We may all disagree and we may be frustrated with that decision, but it is not a cause to change the Americans with Disabilities Act to the broad definition that is being proposed in the Senate bill.

Senator HARKIN. I understand that Wal-Mart changed its policy later on. Wal-Mart changed its policy later on to exactly cover what Mr. Orr's situation was, Ms. Olson. Why did they do that? I guess they're free to do that if they want? Or are they free not to do that if they want?

Ms. OLSON. I don't know the answer to that question.

Senator HARKIN. Well, I'm just telling you, they did.

Ms. OLSON. I understand that they did, but I don't know why they did, which is what you asked.

Senator HARKIN. Do you have a response to that Ms. Feldblum?

Ms. FELDBLUM. Yes, I think that Ms. Olson has just made the strongest case I have heard for why you've done the right thing in S. 1881, for getting rid of the term "substantially limits" a major life activity. Here's why, it's all about the pleadings. It's all about whether you are now smart enough to say, "Well, actually, when I have diabetes, even though with a medication that's now mitigating it, I'm still substantially limited in eating." And here's why, because I have to remember to take my food—and there are some cases where people have argued that, although of course now you have to show that you're severely restricted in eating, and so if you have to think about whether you have to eat, then is that severe—she has exactly described the state of ADA case law today. Absolutely.

Whether Mr. Orr wins or not, is going to be about whether his lawyer was smart enough to argue substantially limited in eating.

I mean, if we hadn't had the *Sutton* case, and mitigating measures weren't taken into account, the lawyer wouldn't have had to

argue about eating, because once you take mitigating measures—when you don't take it into account, you're substantially limited in lots of things.

OK, but here's a way you can get around it—sure, you can write a law that says that. And you know what? To quote what I often hear from the Chamber, that would be a nice employment bill for lawyers. I don't think you want to write an employment bill for lawyers. I think you want to write a simple, clear bill that protects people who are discriminated against, because of a physical or mental impairment.

Let's take the colds, let's take the flu. How many people do you know, recently, who've been fired because they have a cold or the flu? I don't know a lot that have been fired. I can tell you that if you were fired and under the ADA, under the "regarded as" you could demonstrate that you were fired because of that, you could have been protected. Pretty high burden, but you could have done it.

Let's be clear—we are not worried about people being fired for the cold. We are worried about people being fired because they have epilepsy or diabetes or a mental illness that might be mitigated with medication. But even if, God forbid, you want to think about the cold, that was covered under the "regarded as" prong. If you could show you were fired because of that.

That's why I said, the difference is the type of discrimination that some of us face, and others don't. That's what this Congress needs to care about.

Senator HARKIN. Well, we could get into a nice debate here.

[Laughter.]

Ms. Olson, I'd just love to have a response on that, I mean these are——

Ms. OLSON. I do have a response.

Senator HARKIN [continuing]. Logical arguments, go ahead.

Ms. OLSON. I do have a response. Ms. Feldblum said that Congress is not worried. And, in fact, nothing could be more true then that statement. Individuals with minor, temporary impairments were never intended to be covered by the Americans with Disabilities Act in 1990, and they should not be covered today.

It is not just an issue of being terminated, because you have a cold or a sprained ankle, because you were in a basketball game on Saturday afternoon and you sprained your ankle and you're requesting the closest parking space to the door because of that.

It's a question also of reasonable accommodation, which also includes the issue of sick leave. It includes the issue of limited resources in the workplace. And the question is, who under the Americans with Disabilities Act was intended to benefit, to have those benefits. And the answer, under the Rehabilitation Act, as well as the Americans with Disabilities Act, are individuals who have a mental or physical impairment that substantially limits a major life activity. That's language that came right out of the Rehabilitation Act and if you look at the cases, for every case that's—for every condition that is listed on the chart behind you, Senator Harkin, there is another case which I can cite to you, and many of them are included in my written materials already that have been submitted to this committee that show that under the Reha-

bilitation Act, those conditions were determined to not be disabilities, because although it was an impairment, the impairment did not substantially limit the individual's major life activities.

It's a functional approach, not an approach that's based on labeling someone as having a particular condition. And that's what the Americans with Disabilities Act has always been about. Not labeling people, but looking at their abilities.

Senator HARKIN. Ms. Olson, in 2007, you walked into someone on the street and you saw that they was missing an arm, would you say they were disabled?

Ms. OLSON. There's no——

Senator HARKIN. If you saw someone without an arm, would you say they were disabled?

Ms. OLSON [continuing]. There's no question that that person has a physical impairment that in—I would imagine—substantially limits major life activities, but I would have to have more facts than just the facts you gave me to make a determination.

Senator HARKIN. Well, like what kind facts?

Ms. OLSON. The facts would be, how are their major life activities being affected by that loss?

Senator HARKIN. Then really, it's kind of up to the courts, then, to determine how much that person's life activity is affected by the loss of that arm, is that right?

Ms. OLSON. It is——

Senator HARKIN. Courts have to determine that?

Ms. OLSON. Under the Rehabilitation Act and under the Americans with Disabilities Act, having a condition itself does not define someone as disabled. That has always been the case, even prior to the passage of the ADA.

Senator HARKIN. So that, it almost seems that the better, then, that a person has adapted to a disability, the less likely they are to be determined to be disabled.

Ms. OLSON. The more functional a person with a mental or physical is——

Senator HARKIN. Then the less they are likely to be determined as disabled under, what, the ADA?

Ms. OLSON. Under both statutes on the basis that they are not a person that has functionally been limited in their abilities to work, and they aren't the individuals who are intended to be benefiting from affirmative obligations employers are engaging in to assist them into the workplace, because they are able, already functionally, to be there.

Senator HARKIN. But it seems to me, then, we're in a situation where—and I remember we went through this in the 1980's, Dick, we went through it where people said, "you've got to list every single disability." And we were coming up with lists that were longer than this. And finally we said, "We can't do that, we can't possibly list every single disability and the extent to which it may impair a person's abilities." And so that's why we came up with the definitions that we did. And it almost seems what I'm hearing you saying is that this person I ask you to describe, they don't have any arms, do you consider them disabled, it's almost—to paraphrase—it's almost saying, "Well, I don't know, I'd have to know how they function."

Well, does that mean that someone who, then has adapted better to medicine or something like that, or maybe diabetes, well then they're less covered than someone else? The fact that they both have diabetes? They both have an amputation? Or missing a limb? It seems to me that that, by itself, *de facto*, says that you are disabled.

Now, now you've got, you see if you've got that, then you still then have to prove a couple of other things, you know. That you're qualified for the job——

Ms. OLSON. Not under S. 1881.

Senator HARKIN. What?

Ms. OLSON. Not under S. 1881, the burden shifts to the employer to prove that you're qualified under the current draft.

Senator HARKIN. I don't believe that's so.

Ms. Feldblum.

Ms. FELDBLUM. Yes, let me address the qualified issue, and then also, what I think is just some factual mistakes, and since this is a hearing and I want to make sure the record is clear.

First on the "qualified." One of the things that S. 1881 does is simply make the language of ADA be comparable to the language of Title VII of the Civil Rights Act of 1964, something you were trying to do mostly in the ADA, but in a few places we diverged, and under title VII, it says you can't discriminate on the basis of race, sex or religion. And, in the ADA, it said, you can't discriminate against a qualified individual with a disability.

In S. 1881, the language now reads exactly like title VII, "you may not discriminate on the basis of a disability." This entire analysis of the burden shifting is coming from the fact that the word qualified no longer appears in that first section. It's not that you can't discriminate against a qualified person with a disability, instead it's just like title VII. That you may not discriminate on the basis of disability.

So then you have to, so now it's going to be exactly like title VII, the burden of proof will be exactly like title VII, okay? What's the law under title VII? Right there in the beginning of the plaintiff's case, what's called the *prima facie* case, under title VII, the fourth element that a plaintiff has to prove is that they're qualified for the job, because they're trying to raise an inference that they were discriminated against based on race or sex. This will now be the exact same rule for people with disabilities. They will have the same burden of proof that exists under title VII. Why should there be a different one for disability than for title VII?

It is the same burden of proof that exists for anyone who argues discrimination based on sex or religion or national origin, which includes in the *prima facie* case a requirement that you were qualified, that you could demonstrate some evidence that you're qualified. It's not said in title VII, it's the case law in title VII.

This entire brew ha-ha about the change of burden of proof, is because the language is now going to look just like title VII. I'm really curious as to whether now under title VII no one has to prove that they're qualified as part of their *prima facie* case.

I think employers will be very unhappy to hear that plaintiffs don't have that requirement. Very unhappy.

I understand—I feel like this is—someone reads the text and says, "Oh my God, the word qualified has come out of this sentence. I guess the whole burden of proof has shifted." I would suggest that while that might be your first reading of the text, it's not the correct legal ruling. And, if you want—as you pass this bill, in your committee report, to make it clear that the burden of proof on qualified remains exactly the same, I don't think you will get any resistance from any of us who care about disability rights.

Senator HARKIN. That's why I was surprised at your response, because I thought we'd put that in there. And so I was asking Mr. Percy to get that for me, and it's in section 7 of the bill. That's why I'm wondering if you had an earlier draft of the bill or something like that, because the qualified individual is still in section 7.

Ms. FELDBLUM. Yes, the section 7, this is where they pick up their defense issues, section 7 is also a set of defenses. Basically, what we have done in the ADA, and what you continue with S. 1881, even though the comment that you'd be qualified doesn't appear in the text of title VII, it's just read in by the courts, because often someone with a disability is, in fact, not qualified—we all recognized, you basically say it twice. So, you've moved it in section 7 to make it very clear, we are not removing your defense. That you always had, you still have it.

Senator HARKIN. That you're not qualified.

Ms. FELDBLUM. That you're unqualified. You still have that defense.

Ms. OLSON. The current law is different. Under the Americans with Disabilities Act it is absolutely clear that the burden of proof today is not as an affirmative defense as an employer to prove qualified, it is with the plaintiffs in the case. That is a complete shift of the burden on that issue to the defense as an affirmative defense.

There's a reason why title VII is different. There's a reason why it's different. It's different because title VII does not provide affirmative obligations on employers to provide affirmative relief to individuals in a protected class. Under title VII, you are protected no matter what your sex is, because there are reverse discrimination claims. You are protected no matter what your race is, what your national origin or what your religion. It's different under the Americans with Disabilities Act.

In addition, there's a policy reason as to why the burden of proof on the issue of qualified is appropriately on the plaintiff. And the reason is, employers are very limited by the existing law as to what inquiries they can make in terms of qualifications and abilities of existing employees. The facts and terms of qualifications are held by the plaintiff, the plaintiff in all of the cases—under the Rehab Act, and under the Americans with Disabilities Act, have always found, that, in fact the plaintiff has the burden of proving that it is not a defense.

Ms. FELDBLUM. Well, I will be happy to submit to the committee, by the way, a legal memo on this issue, which I think should definitely set at rest any fears that this is different from what the current requirements are. So, let us leave it.

Senator HARKIN. I have to find out more about that, because I thought we basically had kept it more or less the same. You still had to have another hurdle of showing qualified.

Of course there's always been the defense there that you were not qualified, you always have that, the defense always had that. How did I get off on that? That's an interesting point of law, and it's something I think we have to look at.

I guess my point was that, and why I put that chart up there, because these were all of the disabilities that were covered in the Rehab Act, on the left, these were all covered in the Rehab Act. Under the ADA today, those same ones are not considered a disability.

Ms. OLSON. I disagree with that statement, Senator.

Senator HARKIN. OK.

Ms. OLSON. There are cases that hold, under the Rehab Act, that some of those conditions are not covered, because a condition, per se, is not covered. It depends on what the condition's impact is on the individual. No conditions are per se covered, under the Rehabilitation Act as a disability. Under both statutes, all of these conditions are generally referred to as a mental or physical impairment. The question under both statutes really is, are they a disability, because do they functionally impact the individual in a major life function?

I disagree with your chart.

Senator HARKIN. Well, these are the court cases, that's why I put it up there.

Ms. OLSON. I've included in my written testimony, the examples that are different.

Senator HARKIN. Chai Feldblum.

Ms. FELDBLUM. We have read all of the Rehabilitation Act cases. Including the ones cited by Ms. Olson in her testimony.

In 99 percent of these cases, people were just held to be people with handicaps. They just were. There was none of this long analysis—are you really functioning well or not?

There were a few outlier cases—which she's managed to find and cite all 12—where sometimes a court got connected up with, I don't know, and are you really limited in working? They were doing exactly what you were saying, Senator Harkin, that these courts are focused on whether you can't work, when in fact the whole point was that this was supposed to be a law that was going to protect people who wanted to work. As I say, there were a few of those outlier cases. These cases were discussed in 1989 and 1990, because we said, "Do we have to do something to deal with these outlier cases?" And the consensus decision was, we don't, because what the U.S. Supreme Court just said in the *Arline* case, all of those ones that were wrongly decided, in our view, under the Rehabilitation Act, would now be taken care of under the "regarded as" prong, and I have to correct a misstatement of fact, here. That term that you said in reports that "temporary minor impairments are not covered," because they must substantially limit a major life activity—you absolutely did say that in your reports, you said that under prong 1 of the definition, as an explanation.

Under prong 3, you had clearly said, if someone is fired because of an impairment, regardless of how minor, then they're covered.

There were a few of those cases, they were outlier cases then, you thought you took care of them under the third prong.

The U.S. Supreme Court has done two things to your words. They've added this requirement of mitigating measures, that now makes 99 percent of the cases not be covered, so you are not wrong that if you looked at the number of cases of people with epilepsy covered under the Rehab Act—tons. The number of cases with people with epilepsy not covered? Not covered under the ADA? Tons.

The mitigating measures point shifted so many people out of coverage. And then what you thought was the failsafe, which was the third prong, got messed up because of this requirement, that the employers regard you as limited in a broad range of jobs. That's it.

Oh, one last thing, on the per se—this idea that, Oh my goodness, if you just assume that someone who doesn't have an arm is a person with a disability, right away, that that's somehow a group-based, per se, and counter to the individualized assessment that you want for people, this is what you said in your Senate Labor report, under the first prong, "substantially limits."

For example, a person who is paraplegic will have a substantial difficulty in the major life activity of walking. A dead person will have a substantial difficulty in hearing oral communications, and a person with lung disease will have a substantial limitation in the major life activity of breathing. Will have.

It doesn't matter if with the lung disease, now you took your medication, and so now you're functioning well—no. You thought groups of people would be considered disabled under that first prong. We're worried about a group-based analysis. You wanted the individualized assessment to see whether the person with the paraplegia could do the job—that's the individualized assessment, not as to whether they're covered.

Senator HARKIN. No, that's good, one of the reasons why we have these hearings is to make the record, and this is making the record.

Let me ask every one of you, just this simply—I'm a lawyer, but not a very good one.

[Laughter.]

Straightforward, nonlawyer type of question. Just in your opinion, because of your background, is there a problem with the Americans with Disabilities Act we have now, is there a problem with the way that it's being interpreted. Is the way the ADA now is impacting people's lives, does it need to be changed, rectified, changed, does something need to be done? Or is it fine just to go on the way we are?

Mr. Kemp.

Mr. KEMP. It needs to be changed. There are great weaknesses in the definition. We have changed the way in which we approach this, it's a discrimination on the basis of disability is what is prohibited. There isn't a day that goes by that I am not assigned or ascribed either super-ordinate attributes, which is unreal and unfair, and not true. And most of the time, there are perceptions of me that are quite limiting and quite negative. And whether my prostheses help me function independently, which they do, the third prong of the definition is critical, because people still perceive

me as being less than a qualified individual, almost on a daily basis.

We have got to get the definition back to where we thought we had it, and where the record showed us in 1990.

Senator HARKIN. OK.

Mr. Thornburgh.

Mr. THORNBURGH. No question but what the act, as it's been interpreted by the U.S. Supreme Court and other subordinate courts has had a negative impact on persons with disabilities who were involved in those cases. You're not going to address them case by case, you're looking for a systemic solution, and I think you have come up with a reasonable approach to making sure that the original intent of those of us who were involved in drafting this act is fulfilled.

I commend you for that, and I suggest it's good guidance for your colleagues in both Houses, in passing this into law.

Senator HARKIN. Thank you very much.

Mr. Orr, from your personal experience—I hope you're not a lawyer, too.

Mr. ORR. No. That would be a real disability.

[Laughter.]

Senator HARKIN. Just from your own personal experience. The ADA as it is impacting people's lives now, does it need to be changed?

Mr. ORR. Most definitely we need some clarification on the ADA. I should not have been told by my employer that I could not be able to have a lunch and be able to treat my diabetes. And I was told in court responses that I was not disabled, and I don't know of any of us here that does not need three squares a day.

Senator HARKIN. Do you have sufficient accommodation in your job now?

Mr. ORR. Yes, I do. And——

Senator HARKIN. Let me ask you this—and I thought I was right, I thought I had read this, that after all of the dust settled on your case, that Wal-Mart did change its policy, is that the case?

Mr. ORR. Yes, they have. In the store that I was a pharmacist, they now have a sign posted that the pharmacy will be closed for a half an hour while the pharmacist takes a lunch break when there's only one pharmacist on duty.

Senator HARKIN. To me, that just says reams. Now, Ms. Olson says it's because you had a bad lawyer. You know, that your pleading wasn't right. You know, and I guess what we're trying to do here, is to make it so that it doesn't just depend upon the pleadings itself.

Mr. ORR. Well, I feel like if I would have had the language in the ADA's intent, I should have had protection to be able to have continued in the job that I had taken, and had hoped to continue with.

Senator HARKIN. Ms. Olson, the way the ADA impacts people's lives today, does it need to be changed?

Ms. OLSON. Thank you, Senator Harkin.

I'd like to be begin by saying, I recognize the frustration that you've expressed today in this committee and that others have expressed and have testified today, regarding the results that have

been reached in individual cases. The solution is not the change that's been proposed in connection with S. 1881. S. 1881 is not consistent with legislative history, with the language of the statute, that the language of the statute that the Americans with Disabilities Act was based upon, the Rehabilitation Act. It's not consistent with the balancing of rights, and with the focus on the individuals who were intended to be impacted by the Americans with Disabilities Act.

Senator HARKIN. What is the solution? I can't change the U.S. Supreme Court.

Ms. OLSON I understand, and I understand you're having hearings and that you're considering, and reviewing those decisions to understand whether there may be some other accommodations and I mean that word in a different way—some other ways to look at some of the issues that have been raised in these cases.

I am addressing——

Senator HARKIN. Excuse me for interrupting—but getting back to my initial question. Is the way the ADA is impacting lives today, of people with disabilities, does it need to be changed?

Ms. OLSON. It is impacting the lives of individuals with disabilities in a very positive way, as I've described at the beginning of my testimony, and as I, and many human resource professionals and employers who work on issues daily with individuals in their workplaces that have disabilities.

Senator HARKIN. But, I'm still trying to get to this, I can't get an answer yes or no. I mean, if it does need to be changed, I want to know how you think it ought to be changed, if it doesn't need to be changed, say so. And then that's quite clear cut—it gets down to the point—does Mr. Orr have a disability or not? In your opinion, does he have a disability?

Ms. OLSON. There's no question that there was a split in the Court as to whether or not he has a disability, and——

Senator HARKIN. I'm asking you—I'm not asking the Court. You're here——

Ms. OLSON [continuing]. I understand, but I think that's important, as well, not just my opinion, Senator Harkin. My opinion as a labor practitioner in this area is that——

Senator HARKIN. You have a lot of knowledge in this area.

Ms. OLSON [continuing]. My opinion is that based on the facts as I read them before the 8th Circuit, that I would conclude that he does have a disability, as described under the Americans with Disabilities Act. But those weren't the facts that were presented and that were before the 8th Circuit on the lower court's decision. We can't make legislation based on an inaccurate or inappropriate presentation of facts in a court proceeding.

In connection with that particular case, I will tell you that there's no question that in many, many cases involving the exact same conditions that's presented by Mr. Orr, the courts have concluded that the individual has a disability. The particular information was not presented to the court, and, in fact that wasn't the conclusion that was ultimately determined.

Senator HARKIN. But it's not—not to get into a back and forth here—but it's not one case. We have several cases. And because those cases were at the U.S. Supreme Court level, they've filtered

down now through the appellants and down into the lower courts. And so it's not just one case, it's hundreds of cases, now it's thousands of cases to the point where the latest statistic I saw was that 97 percent of the cases brought are now judged not covered by ADA. Ninety-seven percent.

Ms. OLSON. Senator Harkin——

Senator HARKIN. Something's wrong there when it's 97 percent, something's wrong.

Ms. OLSON [continuing]. Senator Harkin, the U.S. Supreme Court isn't the body that imported the functional approach to determining whether somebody has a disability into the law. The legislative history, the act itself and the predecessor act, or the related act, the Rehabilitation Act, all contain language that support that approach. That approach is working in the workplaces that I work with every day.

Senator HARKIN. But it sure didn't work for Mr. Orr, nor is it working for thousands of Americans out there today that are facing this Catch–22 situation, Ms. Olson. Where if they take any medicine to mitigate their diabetes or whatever it might be, their epilepsy, let's take that, then they're qualified for a job, then they become qualified, they can do that job. Once they have that job, and the employer finds out they have epilepsy, they can be fired, because they're no longer covered by ADA.

That happens a lot in a real life today—and I see these cases all the time—what happens is that a person with a disability is caught—do I use a prosthetic, do I use a device, do I take my medicine? I can get my job now, and I can not just get a job bagging groceries, but I can get a job for which I'm qualified. But then I lose all of my protections under the ADA.

Or, do I not take my medicine, and I'm covered by ADA but I can't get the job. That is the real-life situation that thousands—not just Mr. Orr, not just one or two cases—but thousands and thousands of people with disabilities are confronting every day in our country. When we talk about passing legislation, I don't want to pass the bill just for Mr. Orr. That's not what I'm here about, that's what none of us who are here—to try to aleve a discrimination that's happening in our society, that's what ADA was about, discrimination.

Now we're having the same kind of discrimination in a very adverse way, in a way that Dick Thornburgh and John Kemp and I and others worked so hard to get back in 1990.

Now, if people have suggestions on S. 1881 that it might change, it might do something, I'm well open to that. But, again, I think that the body of opinion—with all due respect, Ms. Olson, is that something needs to be changed. And so, in good faith we contacted you, to try to get as much information on S. 1881, obviously, we have a long process to go through, if people have suggestions and things like that on how it should be shaped, or molded or changed—we're open to that. I don't have a blind eye, here.

I was with Lowell Wicker when we started this whole process, and what we started with is not exactly what we wound up with. We were willing to work with people to make these changes.

The situation, Ms. Olson, I will say to you, cries out for something to be done, so that people aren't going in and aren't faced with this dilemma that they're faced with now.

It happens, it's a real-life situation out there, it happens every day. And that's why I'm so intent on trying to get some legislation that will get back, as Mr. Kemp said, the original intent. I can tell you, this was my bill, I spent a lot of years of my life on this. And the intent was not to have the courts say, "Well, maybe you, and not you, maybe you and not you, depending on how good you are at this and how bad you are at that." If John Kemp uses his prosthesis better than you then he's not disabled, but you are.

We went through all of this. We decided, no, we don't want to get into that, we want this broadly covered, and that's why we did that third prong, "regarded as." If all else failed, we had the catch, gotcha, on the "regarded as" if all else failed.

It seems right now, what's happening is, that has been done away with. I don't mean to get so passionate about that. Now if you have suggestions and advice, I could look at that.

I'm sorry to take so long, Ms. Feldblum. My question I was going to ask you was, Is the way the ADA is impacting lives today, does it need to be changed?

Ms. FELDBLUM. Yes.

[Laughter.]

Senator HARKIN. I guess you've expounded on it more than that.

Ms. FELDBLUM. But, I mean, honestly, it does, for all of the reasons you just said. And let's get to work, and let's try to make that happen.

Senator HARKIN. Like I said, I'm willing to take advice and suggestions, but if someone says to me, "No, it's perfectly fine the way it is," that just doesn't seem right to me, it doesn't seem like that's what I'm seeing out there. It's not what I'm seeing and getting in from all kinds of things that come into my office. I have a full-time person I've had ever since I came into Congress, I've got a full-time staff just working on disability issues, that's how much I care about this issue. I've always had a full-time component of my staff, just working on disability issues, good people, smart. This is why I'm here, this is what's coming in. I didn't just dream this up.

A lot of people—every disability group in this country is coming to me saying, "We've got to do something." Being a public servant being a representative, I feel that we must respond.

As I've looked at it, I have also come to the conclusion, something must be done. I don't know if S. 1881 is the right approach or not, I'm willing to debate that, I mean that's open. But to say that things are fine and we can just sit there, I don't accept that. I don't accept that.

Well, I've gone on too long, I sound like a witness myself.

[Laughter.]

Is there anything else that anybody would like to add? I've kept you here, you've been wonderful to be here this long, is there anything anybody else would like to add at all? John, anything else you'd like to add to this?

Mr. KEMP. I have the privilege of serving as the Executive Director of the United States Business Leadership Network, which is a group of 5,000 companies through 32 affiliates around the country.

And the Board of Directors strongly believes that we should get back to the principles, and support the principles of the rights of people with disabilities as were defined in the 1990 ADA. Businesses that are interested in hiring people with disabilities, doing customer service for people with disabilities, and even vendoring to companies owned by people with disabilities are interested in getting back to, restoring the rights of people with disabilities.

Senator HARKIN. Thank you very much.

Anybody else have anything they want to add?

Mr. THORNBURGH. Let me just reiterate a point that I made in passing during my testimony, Senator, and that is there's a deplorable record of employment of persons with disabilities in this country, in our society and economy today. And while this discussion is useful and the changes that are suggested would be helpful, I just wanted to make the point that we can't lose sight of the fact that much more has to be done in terms of preparing people with disabilities to assume their place in the workplace. They want to work, and appropriate education and job training on top of the removal of any barriers of discrimination and honoring of the principle of accommodation could move that process forward by light years.

I know you share these views, and this isn't necessarily the forum to raise those needs as well as ones being discussed today, but I think we can't let that pass without notice.

Senator HARKIN. I'm glad you brought it up, thank you.

That's the one thing that has bedeviled me since the passage of the ADA, we made wonderful strides in accommodations and transportation, a lot of the things, and that coupled with IDEA, mainstreaming it, getting kids into school. But we really haven't cracked that nut on employment, what is it, 63 percent of people with disabilities are not employed, and of those, I don't know the percentage but a high percentage are underemployed. In other words, they may be working, but they're not working at their full potential for one reason or another.

It really is a scar on our society, and it's just the one thing that we've, just, again, I thought ADA would start moving us in that direction, and we haven't made the strides we should make in that area, we just haven't done it. And it's very frustrating.

Mr. Orr, do you have anything else to add?

Mr. ORR. No, the only thing I can say is what happened to me. When I bring it up to people I know, my customers in the pharmacy and tell them the story of why I'm coming out here to testify, and I tell them what had happened to me in my past employment, everybody says, "They can't do that." The only thing I can say here is that, to testify that, they can and they did, the way the thing's set up, and it needs to be changed.

Senator HARKIN. Anything else to add?

Ms. OLSON. Only to say that I appreciate the opportunity to discuss some of the issues that I see in S. 1881, and I look forward to the continued discussion on this issue.

Senator HARKIN. If you have suggestions, let me know.

Ms. Feldblum.

Ms. FELDBLUM. I want to say that I actually would look forward to working on a new piece of legislation, like something to really

deal with the underemployment and unemployment. And I wish we weren't having to do a re-do of an old piece, absolutely.

I have to say, and this is just speaking personally, that I am looking forward to your leadership and the leadership of the members of your committee on both sides of the aisle just the way that leadership was demonstrated in the original ADA. I absolutely believe that we can get to that bipartisan strong support on this re-do, and then we move forward with everything else that needs to be done, as well.

Senator HARKIN. Well, I can assure you, we're doing everything we can, that's why I wanted to make sure when we introduced the legislation on both the House side and the Senate side we did it in a bipartisan fashion.

I've said many times before, this issue is not a partisan issue—never has been, I don't want it to become one, it shouldn't become one. Some true heroes of this movement have been people on the other side of the aisle, like Lowell Weiker and Bob Dole, and Dick Thornburgh and Boyden Gray and former President Bush and others. And there have been those on our side, too.

It hasn't been partisan. I hope that in that spirit we can get this thing moving again, and get something done to solve a real-life problem that's out there, and do it in a way that garners good national support.

I think we can do it. We did it in 1988. You know, for those of you that weren't around at the time, when we started on this no one thought this was ever going to happen. And we had a lot of brick bats thrown at us—I can remember in 1980—well, I came here in 1985, and I had been doing some stuff in the House before—minor disability issues, and here in 1985 and 1986 with Lowell Weiker, at that time, and he was just a champion of this. And then Lowell left the Senate, and we kept moving ahead on it—boy, those were some pretty dark years, no one thought we could ever get this thing done. But people of good conscience and people of goodwill—you mentioned Sam Skinner, Sam was very heavily involved at that time and we were able to get it done.

I can remember my personal conversations with President Bush, first President Bush at that time about it. I mean, he really was committed to this, I mean, he got it, he understood it.

I think, I'm just saying, been there, I know what it's like. We did it before, we can do it this time, I just hope it doesn't take as many years to do it this time, as it did at that time.

We'll move ahead, I thank you all very much, I thank our audience for being here. This is the first hearing, we have a record started to be made. We will, I'm sure, have other hearings, if not this year, early next year, as we, again, try to move this legislation forward.

With that the committee will stand adjourned.

[Additional material follows.]

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00086 Fmt 6633 Sfmt 6601 S:\DOCS\39388.TXT DENISE

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR ENZI

Mr. Chairman, thank you for holding this very important hearing. Some 17 years ago President George Herbert Walker Bush, signed into law the Americans with Disabilities Act, a landmark piece of legislation that reflected America's fundamental and continuing concern for human rights. The ADA, by extending civil rights protections to individuals with disabilities, reaffirmed the most basic values of our democracy.

Prior to the passage of the ADA, far too many of our fellow American's with disabilities led isolated lives, artificially separated from the mainstream of society, and denied the basic opportunity to pursue the American dream.

Today, in America, things are undeniably different for persons with disabilities than it was when I was growing up. It is certainly different, as well, from 1990 when the ADA was enacted. Time, the law, and even science, which has produced much to aid those living with disabilities, have all brought change. Therefore, it is entirely appropriate for us to review the law and its impact. The definition of what constitutes a disability; or, what is a substantial limitation of a significant life activity; or, what is a reasonable accommodation; or, what is sufficient access may all require review.

The ADA was a victory for fundamental civil rights since it provided full access to society for those who had been denied it simply because of their immutable characteristics—something outside of their control.

Since the passage of the ADA, we have seen significant improvements in the employment and economic well-being of citizens with disabilities. In 2003, the U.S. Census Bureau reported that over the previous 15 years the employment rate for working age men with a disability had increased by more than 25 percent. Simultaneously, the percentage of individuals with disabilities with household incomes at or near the poverty level had contracted dramatically. Other evidence of the ADA's effect was even more readily apparent. For instance, the barriers to mobility once posed by public transportation have been largely eliminated. Today, here in the District of Columbia, for example, 97 percent of the Metro system is accessible to persons with disabilities.

Yet, as might be expected after only 17 years, challenges do remain. Although 60 percent of working age men and 51 percent of women with disabilities are working, only 35 percent of people with disabilities report being employed full time, compared to 78 percent of those who do not have disabilities (Harris poll). Additionally, according to the U.S. Census, earnings for full-time workers disabilities are still 24 percent less than workers without disabilities. While 26 percent of adults with disabilities currently have household incomes of $15,000 or less, only 9 percent of individuals without disabilities have household incomes of $15,000 or less. Why is there still a discrepancy between these two populations? With the pending reauthorization of the Higher Education Act and the Workforce Investment Act, which includes the Rehabilitation Act we have the opportunity to address these disparities, improve our

VerDate Nov 24 2008 12:54 Apr 01, 2009 Jkt 035165 PO 00000 Frm 00087 Fmt 6633 Sfmt 6601 S:\DOCS\39388.TXT DENISE

economic competitiveness and cultivate a society of lifelong learners.

Increasing employment for this population is an incredibly important goal, and one I hope this committee will undertake with seriousness. In many cases, the accommodation that is necessary to empower an individual with a disability to function fully in society and live with financial independence is just now becoming available. The Assistive Technology Act of 2004, a bill that I cosponsored along with several of my committee colleagues, provides a Federal program connecting individuals with disabilities to new technologies so that they can achieve even more in school, maintain high levels of productivity at work, and participate more fully in society. Here again technology is providing answers that were not even imaginable 17 years ago when the ADA was written.

I also want to congratulate many of the people who are here in this room today for their involvement in enacting the ADA. As I think most of you will agree, one of the reasons it was able to be signed into law by President George H.W. Bush was because it was crafted in a bipartisan, cooperative way. People like Bob Dole and our committee colleagues Orrin Hatch and Tom Harkin listened to their counterparts on the other side of the aisle, on the other side issues, and on the other side of ability. I've said it before, but it needs to be reiterated in today's environment. The best way to actually accomplish legislative goals is to work together.

Those of you who have worked with me and my staff on legislative issues relating to disabilities know that this is the way I like to operate. On bills such as the Vocational Rehabilitation Act, which we are still working to get enacted, The Combating Autism Act, JWOD, and SAMHSA reauthorization, bringing all of the stakeholders around the table was and continues to be a critical step in the process.

From what I have seen, that has not yet been done with the legislation introduced by Senator Harkin. Although the text of S. 1881 was first introduced over 2 years ago in the House of Representatives, the bill has yet to undergo the kind of stakeholder review and revision that is necessary, in my view, to create a passable legislative product. S. 1881 is the third version which has been introduced, yet, to my knowledge no changes have been made in the bill. Undergoing such a process would have raised, and might have resolved, some of the concerns that will be raised today about the bill. For example, does it open the definition of disability too far and allow virtually everyone to qualify as disabled, at least at some point in their life? Does the bill create a default Federal "just cause termination" right of action?

In negotiation, when you gather the stakeholders around the table for the first time, the first thing you do is agree on the problem you are working to address. I do not believe that step has been taken here. Instead, I believe that some merely want to claim that they, and they alone, know precisely what Congress intended 17 years ago; and, that many of the reviewing Federal Courts have simply gotten it wrong since then. Therefore, no further discussion is necessary since we merely need to restore that which was originally intended. Unfortunately, that claim of a monopoly on the truth is sure to stand in the way of any meaningful discussion or

progress. The process must respect the fact that reasonable people may disagree; and, that divining the precise intent of Congress is a speculative claim at best. Productive dialogue rarely begins with an absolutist position. I believe we need to begin by discussing and agreeing on the problem, instead of beginning with a proposed solution which is clearly overbroad. I look forward to today's proceedings.

PREPARED STATEMENT OF JOHN R. VAUGHN, CHAIRMAN, NATIONAL COUNCIL ON DISABILITY

The National Council on Disability (NCD) would like to thank the committee for this opportunity to provide testimony in support of the need to restore the Americans with Disabilities Act (ADA), and to share information the NCD has learned about the impact on people with disabilities resulting from a series of Supreme Court interpretations of the definition of "disability" under the ADA.

INTRODUCTION

NCD is an independent Federal agency, composed of 15 members appointed by the President and confirmed by the Senate. NCD's purpose is to promote policies and practices that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability, and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and integration into all aspects of society.

NCD's duties under its authorizing statute include gathering information about the implementation, effectiveness, and impact of the ADA.[1] In keeping with this requirement, one of NCD's monitoring activities has been to analyze the Supreme Court cases interpreting the ADA. From 2002 to 2004, NCD produced a series of 19 policy briefs analyzing the Supreme Court's ADA cases[2] and their ramifications on subsequent Federal court cases. This work culminated in a comprehensive report, *Righting the ADA*,[3] in which NCD proposed language for an ADA Restoration Act.

The Supreme Court has issued several decisions relating to the definition of "disability" under the ADA. These decisions have narrowed the definition of "disability," restricting substantially the number of individuals entitled to protection under the law. NCD has reviewed the history and evolution of the definition of "disability," analyzed the Congressional intent with respect to coverage, reviewed the effect of EEOC regulations and guidance on the definition, and examined the Supreme Court decisions involving the definition of "disability."[4] NCD concludes that the Supreme Court's interpretation of the definition of "disability" under the ADA has so altered the ADA that the majority of people with disabilities now would have no Federal legal recourse in the event of discrimination, particularly in instances of employment discrimination. An ADA Restoration Act is urgently needed to restore the ADA's protections against disability-based discrimination for all Americans.

NCD'S ROLE IN THE PASSAGE OF THE ADA

NCD played a key role in the inception of the ADA.[5] NCD first proposed the concept for the ADA, Federal legislation to address the discrimination experienced by people with disabilities, in its 1986 publication, *Toward Independence: An Assessment of Programs and Laws Affecting Persons with Disabilities—With Legislative Recommendations*.[6] The first published draft of the law was included in NCD's report, *On the Threshold of Independence*[7] in early 1988. The ADA was then introduced in the House and the Senate in April of that year.

While the bill was introduced too late in the congressional session to be voted on by both chambers, NCD continued to play a pivotal role in the passage of the bill. NCD members continued to meet with various members of the disability community. NCD released another report, *Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities*, which evaluated poll results and made recommendations based on the findings.

On Capitol Hill, Congressman Major Owens created the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities, which researched the extent of discrimination. The Task Force was chaired by former NCD Vice Chairperson Justin Dart, and its coordinator was former NCD Executive Director Lex Frieden. Revisions were made to the initial draft, with the assistance of national disability consumer organizations. Strong bipartisan support for the ADA had developed by the time Congress returned for the next session. Both the House and Senate passed similar bills and, in mid-July, both chambers passed the final version

of the ADA, which was signed into law by President George H.W. Bush on July 26, 1990.

DEFINITION OF "DISABILITY" IN THE ADA

Congress modeled the definition of disability in the ADA on Section 504 of the Rehabilitation Act, which had been construed to encompass both actual and perceived limitations, and limitations imposed by society. The definition adopted by Congress and the legislative history of the ADA demonstrate the intention to create comprehensive coverage under the statute. This definition of "disability" was conceived as a broad element that would extend statutory protection to anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived.

The Supreme Court's decision in *School Board of Nassau County* v. *Arline*[8] was the leading legal precedent on the definition of disability when Congress was considering the ADA. Several committee reports regarding the ADA expressly relied on the *Arline* ruling in discussing the definition of disability. In *Arline*, the Court took an expansive and nontechnical view of the definition of "disability." The Court found that Ms. Arline's history of hospitalization for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act.[9] The Court made this ruling even though her discharge from her job was not because of her hospitalization.

The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted that, in establishing the new definition of disability in 1974, Congress had expanded the definition "so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."[10]

To ensure that the definition of disability and other provisions of the ADA would not receive restrictive interpretations, Congress included a requirement that "nothing" in the ADA was to "be construed to apply a lesser standard" than is applied under the relevant sections of the Rehabilitation Act, including section 504.[11] At the time of the ADA's enactment, it was not contemplated that disability discrimination cases would come to be more about determining the extent of someone's disability, rather than about whether discrimination, in fact, occurred.[12]

For several years after the ADA was signed into law, the pattern of broad and inclusive interpretation of the definition of disability, established under section 504, continued under the ADA. In 1996, a Federal district court declared that "it is the rare case when the matter of whether an individual has a disability is even disputed."[13] As some lower courts, however, began to take restrictive views of the concept of disability, defendants took note, and disability began to be contested in more and more cases.

THE SUPREME COURT CHANGES THE ADA DEFINITION OF DISABILITY

Beginning with its decision in *Sutton* v. *United Airlines* in 1999, the U.S. Supreme Court started to turn its back on the broad interpretation of disability endorsed by the Court in the *Arline* decision.[14] By the time of the *Toyota* v. *Williams* decision in 2002, the Court was espousing the view that the definition should be "interpreted strictly to create a demanding standard for qualifying as disabled."[15] This position is directly contrary to what the Congress and the President intended when they enacted the ADA.

A narrow interpretation of the term "disability" under the ADA excludes many people whom Congress intended to protect. Recognizing that discrimination on the basis of disability takes place in various ways against people with various types of disabilities, Congress had adopted a time-tested and inclusive, three-prong definition of "disability" in the ADA—protecting not only individuals with actual disabilities, but also those with a history of having a disability or who are regarded as having a disability. Congress was entitled to expect that this definition would be interpreted expansively because the courts and regulations had interpreted the identical definition in the Rehabilitation Act broadly. NCD views as draconian and erroneous the stereotypical view of disability that would extend ADA protection only to those who are so severely restricted that they are unable to meet the essential demands of daily life.[16]

In June 1999, the Supreme Court decided *Sutton* v. *United Airlines*,[17] a case involving pilots needing corrective lenses, and *Murphy* v. *United Parcel Service*,[18] a case involving a man with high blood pressure. In both cases, the Court held that, in determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persist after tak-

ing into account mitigating measures, e.g., medication or auxiliary aids and services and any negative side effects the mitigating measures may cause.

On the same day in 1999, the Supreme Court decided *Albertson's* v. *Kirkingburg*,[19] a case involving a man who was blind in one eye. The Court held in *Kirkingburg* that a "mere difference" in how a person performs a major life activity does not make the limitation substantial; how an individual has learned to compensate for the impairment, including "measures undertaken, whether consciously or not, with the body's own systems," also must be taken into account.[20] These three cases, *Sutton, Murphy* and *Kirkingburg* are often referred to as the "*Sutton* trilogy."

The result of these decisions is that people who Congress clearly intended to be covered by the ADA,[21] such as people with epilepsy,[22] diabetes,[23] depression,[24] and hearing loss,[25] are now being denied employment and refused reasonable accommodations because of their disability or the mitigating measures they use, and courts refuse to hear their cases, regardless of how egregious their employers' actions.

These decisions have resulted in courts now making elaborate inquiries into all aspects of the personal lives of ADA plaintiffs in order to determine whether, and to what extent, mitigating measures actually alleviate the effects of the disability—none of which is relevant to the question of whether discrimination occurred. Such inquisitions about the extent of people's disabilities is inconsistent with other provisions of the ADA that sharply restrict the use of inquiries about the nature and extent of disabling conditions and of medical information about an individual's limitations.[26]

When elaborate inquiries are called for by the ADA, they should be about the individual's abilities—not his or her disabilities.[27] Not only are elaborate inquiries into the extent of a person's disability demeaning and extremely costly in terms of litigation resources, they miss the point. It does not matter if medication stabilizes a person's blood sugar if the employer harbors an irrational fear that it will not do so, and terminates the employee. It does not matter how effective someone's hearing aids are if an employer refuses to hire him because the employer believes his insurance rates will increase if he hires a person with a hearing impairment. It does not matter if working the day shift would eliminate someone's risk of seizures if the employer refuses the employee's request to switch from the night shift to the day shift.

By focusing on how well mitigating measures alleviate the effects of a disability, the Supreme Court has denied discrimination protection to people who are likely to be capable of doing the job. It is a rare plaintiff who is able to successfully challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

The Supreme Court has also changed the meaning of "substantial limitation of a major life activity" in ways that screen out even more people with disabilities that Congress intended to protect. Closely tracking the Rehabilitation Act, the first prong of the ADA definition of disability provides that a condition constitutes a disability if it "substantially limits one or more of the major life activities of such individual."[28] In *Toyota* v. *Williams*, the Court changed substantially limits to mean "prevents or severely restricts."[29]

In the *Williams* case, the Court also decided that to be substantially limited in a major life activity, a person must be substantially limited in an activity "of central importance to most people's daily lives," and held that "substantially limited in a major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled."[30] The phrase "of central importance to most people's daily lives" has led to extensive questioning about an individual's ability to brush his or her teeth, bathe, dress, stand, sit, lift, eat, sleep, and interact with others.[31] It has led to contradictory rulings by Federal courts about whether activities such as communicating, driving, gardening, crawling, jumping, learning, shopping in the mall, performing house work, and even working and living are "major life activities."[32] In hundreds of cases of alleged disability-based discrimination, people with disabilities have had to spend their resources litigating such issues, often with the question of whether disability-discrimination occurred never being addressed.

The cases discussed here represent only a portion of the problematic issues raised by a string of decisions by the Supreme Court which have significantly diminished the civil rights of people with disabilities.[33] The ADA Restoration Act is needed to return the focus to examination of the relevant facts of the case when disability discrimination is alleged. Can the person with a disability perform the essential functions of the job, with reasonable accommodations, if necessary? Would the reasonable accommodation pose an undue hardship on the employer? Would the person's mental or physical impairment pose a safety risk to others that could not be eliminated by a reasonable accommodation? Did the employer discriminate against the employee on the basis of a real or perceived disability?

As NCD declared in its *Righting the ADA* report:

> The Court's position that the definition of disability is to be construed narrowly represents a sharp break from traditional law and expectations. It ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a comprehensive prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition of disability that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition would continue to receive a generous reading.
>
> In crafting the ADA, Congress did not treat nondiscrimination as something special that can be spread too thin by granting it to too many people. Unlike disability benefits programs, such as Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI), which are predicated on identifying a limited group of eligible persons to receive special benefits or services that other citizens are not entitled to obtain, and for which the courts have sought to guard access jealously, the ADA is premised on fairness and equality, which should be generally available and expected in American society. The Court's harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.[34]

Given the extensive congressional record regarding findings of discrimination against many types of disabilities and the broad coverage of the ensuing ADA regulations, the general understanding following enactment of the ADA was that anyone experiencing disability-related discrimination had a remedy in court. People with disabilities of all types presume they are covered by the ADA when many of them now are not.

RESTORATION, NOT EXPANSION

The ADA was intended to apply to every person who experiences discrimination on the basis of disability; protection from discrimination is not a special service reserved for a select few. The law was crafted to extend protection even to people who are not actually limited by their conditions but who experience adverse treatment based on fear, stereotyping, and stigmatization.

The ADA Restoration Act supports the purpose of the ADA, to prohibit discrimination, by removing the obstacle of forcing a person to prove that he or she has a sufficiently severe impairment to justify protection under the law. The language in the ADA Restoration Act still requires a plaintiff to show that discrimination occurred based on his or her real or perceived physical or mental impairment to successfully bring a claim under the ADA. The ADA still protects only those who can prove discrimination based on that impairment, and, in addition, in the employment context, individuals who can demonstrate that they are qualified to perform the job.

Congress balanced the interests at stake when it passed the ADA 17 years ago. Congress included, for instance, elements intended to protect the interests of small businesses, and these elements remain in place under the ADA Restoration Act, including: the exemption for small employers, the undue hardship limitation, the readily achievable limit on barrier removal in existing public accommodations, the undue burden limitation regarding auxiliary aids and services, and the elevator exception for small buildings, among others.[35] The bill currently before Congress restores the original intent of a carefully crafted law.

VETERANS WITH DISABILITIES

NCD is particularly concerned about the impact of the developments in the ADA case law on veterans with disabilities. Service members returning from the current conflict in Iraq and Afghanistan are experiencing a very high incidence of disabilities, including post-traumatic stress disorder and traumatic brain injuries.[36] Veterans also experience higher than average rates of chronic health conditions after serving in armed conflicts.[37] Veterans are nearly three times as likely as the general population to develop diabetes.[38] According to the Epilepsy Foundation,[39] the high number of veterans experiencing traumatic brain injuries portends an increase in the incidents of epilepsy among this group, as traumatic brain injury is a significant risk factor for developing epilepsy. As a result of exposure to explosions and close-range weapons fire, veterans also experience much higher than average incidents of hearing loss.[40] Given the high number of veterans returning from the current conflicts with disabilities, and the likelihood that a high number of returning veterans will experience the very types of chronic health conditions the Supreme

Court has deemed ineligible for protection from disability-based discrimination in the workplace, it becomes even more urgent that Congress act now to restore the ADA so that veterans with disabilities who are able to work are not subjected to employment discrimination.

CONCLUSION

The Americans with Disabilities Act was designed to prohibit disability-based discrimination against all Americans, whether or not they actually have a disability. The Supreme Court has issued many decisions interpreting the ADA since its enactment, limiting the scope of the ADA and transforming it into a "special" protection for a select few. The result is that disability discrimination now occurs with impunity, particularly in the workplace. Unless and until Congress takes action to correct the course of the ADA, most Americans are no longer protected from disability-based discrimination. NCD urges Congress to act quickly to re-instate the scope of protection Congress initially provided in the ADA.

REFERENCES CITED

1. For a list of NCD's publications on the ADA: *http://www.ncd.gov*.
2. *See* NCD's *Policy Brief Series: Righting the ADA at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm*.
3. National Council on Disability, *Righting the ADA* (2004), available at *http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm*.
4. *See* National Council on Disability, *Americans with Disabilities Act Policy Brief Series: Righting the ADA—No. 6, Defining "Disability" in a Civil Rights Context: The Courts' Focus on Extent of Limitations as Opposed to Fair Treatment and Equal Opportunity*, (2003), at *http://www.ncd.gov/newsroom/publication/extentoflimitations.html*.
5. For additional information, see NCD's 1997 publication, *Equality of Opportunity: the Making of the Americans with Disabilities Act, http://www.ncd.gov/newsroom/publications/1997/equality.htm*. NCD's role with respect to the ADA is also described in the 2004 report *National Council on Disability: 20 Years of Independence, http://www.ncd.gov/newsroom/publications/2004/publications.htm*.
6. National Council on Disability, *Toward Independence: An Assessment of Programs and Laws Affecting Persons with Disabilities—With Legislative Recommendations* (1986), *available at http://www.ncd.gov/newsroom/publications/1986/toward.htm*.
7. National Council on Disability, *On the Threshold of Independence* (1988), *available at http://www.ncd.gov/newsroom/publications/1988/threshold.htm*.
8. *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 284 (1987).
9. *Id.* at 281.
10. *Id.* at 279.
11. 42 U.S.C. § 12201(a).
12. For additional information, see NCD's policy papers that discuss the care with which the ADA definition of disability was selected and the breadth of that definition, *A Carefully Constructed Law and Broad or Narrow Construction of the ADA*, papers No. 2 and No. 4, respectively, of NCD's *Policy Brief Series: Righting the ADA at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm*.
13. *Morrow* v. *City of Jacksonville*, 941 F. Supp. 816, 823 n. 3 (E.D.Ark. 1996).
14. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999).
15. *Toyota Motor Mfg., Ky., Inc.* v. *Williams* 534 U.S. 184, 197–98 (2002).
16. National Council on Disability, *National Council on Disability: 20 Years of Independence (2004)*, *available at http://www.ncd.gov/newsroom/publications/2004/twentyyears.htm*.
17. *Sutton,* 527 U.S. 471 (1999).
18. *Murphy* v. *United Parcel Service, Inc.*, 527 U.S. 516 (1999).
19. *Albertson's Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).
20. *Id.* at 564–67.
21. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990).
22. *See Todd* v. *Academy Corp.*, 57 F. Supp. 2d 448, 453–54 (S.D. Tex. 1999).
23. *See Nordwall* v. *Sears, Roebuck & Co.*, 46 Fed. App. 364, 2002 WL 31027956 (7th Cir. 2002) (unpublished).
24. *See Spades* v. *City of Walnut Ridge*, 186 F.3d 897, 900 (8th Cir. 1999).
25. *See Martell* v. *Sparrows Point Scrap Processing*, 214 F. Supp. 2d 527 (MD. 2002).
26. 42 U.S.C. 12112(d)(2)(A) ("Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as

to whether such applicant is an individual with a disability or as to the nature or severity of such disability."); 42 U.S.C. 12112(d)(2)(B) ("A covered entity may make inquiries into the ability of an employee to perform job-related functions."); 42 U.S.C. 12112(d)(4)(A) ("A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.").

27. *Id.*

28. 42 U.S.C. § 12102(2)(A).

29. *Toyota,* 534 U.S. 184 (2002).

30. *Id.*

31. National Council on Disability, *Policy Brief Series: Righting the ADA, No. 13, The Supreme Court's ADA Decisions Regarding Substantial Limitation of Major Life Activities* (2003), at *http://www.ncd.gov/newsroom/publications/2003/limitation.htm*.

32. *Id.*

33. *See* NCD, *Righting the ADA* (2004), *available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.* More detailed descriptions of the specific issues and problems are presented in the *Righting the ADA* series of policy briefs published on NCD's Web site at *www.ncd.gov/newsroom/publications/2003/policybrief.htm*.

34. National Council on Disability, *Righting the ADA* (2004) at 11, *available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm#IIA*.

35. For more information, see NCD statement on the subject of the Notification Act at *http://www.ncd.gov/newsroom/news/2003/r03–408.htm*.

36. According to the 2004 Report of the Special Committee on Post-Traumatic Stress Disorder, established by Congress in 1984 to monitor this problem, 40 percent of casualties returning from Iraq and Afghanistan to Walter Reed Army Medical Center reported symptoms consistent with PTSD.

37. National Academy of Sciences, *Gulf War Veterans Experience Health Symptoms, But Not Unique Syndrome: Elevated Rates of ALS, Psychological Conditions Found* (Sept. 12, 2006).

38. U.S. Department of Health and Human Services, *HHS and VA to Target Diabetes, Obesity Among American Veterans* (Feb. 27, 2006) *http://www.hhs.gov/news/press/2006pres/20060227.html* (visited Nov. 9, 2007).

39. Brenda Patoine, *High Rate of Head Injuries in Iraq Soldiers Portends Potential Wave of Epilepsy, http://www.epilepsyfoundation.org/epilepsyusa/tbi-specialreport. cfm* (visited Nov. 9, 2007).

40. National Academy of Sciences, Institute of Medicine, *Noise and Military Service: Implications for Hearing Loss and Tinnitus* (Sept. 22, 2005).

PREPARED STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION, CAROLINE FREDRICKSON, DIRECTOR, ACLU WASHINGTON LEGISLATIVE OFFICE AND JOANNE LIN, LEGISLATIVE COUNSEL, ACLU WASHINGTON LEGISLATIVE OFFICE

IN SUPPORT OF THE AMERICANS WITH DISABILITIES ACT RESTORATION ACT OF 2007 (S. 1881)

The American Civil Liberties Union (ACLU) applauds the Senate Health, Education, Labor, and Pensions Committee for holding this hearing on the Americans with Disabilities Act ("ADA") Restoration Act of 2007 and appreciates the opportunity to submit a statement for the record. The ACLU also wishes to thank Senators Harkin (D–IA), Specter (R–PA), and Kennedy (D–MA) for their important leadership in championing this key legislation.

The ACLU is a nonpartisan public interest organization dedicated to protecting the constitutional rights of individuals. The ACLU consists of hundreds of thousands of members, activists, and 53 affiliates nationwide. The ACLU has pursued pioneering work in disability rights for over 35 years. A highlight in this long record was the ACLU's leadership role in securing passage of the Americans with Disabilities Act ("ADA") in 1990.[1] In addition, the ACLU has participated in landmark disability litigation including *Bragdon* v. *Abbott*, 524 U.S. 624 (1998)[2]; *Sutton* v.

[1] Chai Feldblum, former legislative counsel with the ACLU, served as a lead legal advisor to the disability and civil rights communities in the drafting and negotiating of the ADA in the late 1980s and 1990.

[2] The ACLU wrote an amicus brief in *Bragdon* which addressed whether individuals with asymptomatic HIV and AIDS were covered under the protections of the ADA. Available at *http://www.aclu.org/scotus/1997/22683lgl19980201.html*.

United Airlines, Inc., 527 U.S. 471 (1999)[3]; *Chevron, USA, Inc.* v. *Mario Echazabal*, 122 S. Ct. 2045 (2002).[4]

In 1990 Congress passed the ADA with overwhelming bipartisan support, creating a landmark civil rights law that improved the lives of millions of people with disabilities. In passing the ADA, Congress advanced the goals of ensuring equal opportunity, full participation, independent living, and economic self-sufficiency for all people with disabilities.[5] The purpose of the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "to provide clear, strong, consistent, enforceable standards" for addressing such discrimination.[6]

Unfortunately 17 years after enactment of the ADA, the promise of equal opportunity in employment has gone unfulfilled for many people with disabilities due to a series of U.S. Supreme Court decisions that have narrowed the definition of disability under the ADA contrary to congressional intent. This has resulted in the exclusion of many persons whom Congress intended to protect including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, post traumatic stress syndrome, and many other impairments. The ACLU believes that an individual has the right to be judged on the basis of her or his individual capabilities, not on the presumed characteristics and capabilities that others may attribute to those who share a particular impairment. The court decisions are at odds with this regimen and have created an unintended Catch–22 where individuals taking medication or using other mitigation measures to manage their condition may no longer qualify as "disabled" under the ADA. Thus those individuals who diligently manage their condition or impairment may be denied reasonable accommodations or be terminated, without ever being able to present the merits of their case in court.

The ACLU supports the ADA Restoration Act of 2007 (S. 1881) as a necessary fix to this Catch–22 problem. The ADA Restoration Act restores Congress' original intent in extending discrimination protections to all people with disabilities, regardless of mitigating measures, who are discriminated against because of their disability. The ACLU encourages its passage in order to guarantee equal protection for all people, regardless of disability.

PREPARED STATEMENT OF THE DISABILITY POLICY COLLABORATION (IN SUPPORT OF THE ADA RESTORATION ACT OF 2007 (S. 1881)

THE DISABILITY POLICY COLLABORATION OF THE ARC AND UNITED CEREBRAL PALSY URGES CONGRESS TO KEEP ITS PROMISE TO END UNFAIR EMPLOYMENT DISCRIMINATION

Although the Americans with Disabilities Act (ADA) of 1990 has resulted in access to thousands of public accommodations and government services that people with disabilities were never before able to enjoy, the full promise of this law is yet unfulfilled. Many people with disabilities who want to work and be treated fairly in the workplace face the same continued discrimination that the ADA sought to eliminate.

The Supreme Court and other court decisions have narrowly interpreted the definition of disability under the ADA, which is reasonably defined as: (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

Instead of protecting people with disabilities, the courts have created a no-win situation for people with disabilities in the workplace. People with disabilities are often deemed "too disabled" to do the job but not "disabled enough" to be protected by the law. The following cases exemplify this unfortunate Catch–22:

• A circuit court upheld a lower court's refusal to hear the case of a man with an intellectual disability. Writing for the majority, the judge wrote that it wasn't

---

[3] The ACLU wrote an amicus brief in *Sutton*, arguing that the ADA was intended to be applied broadly to protect individuals with disabilities from discrimination in the workplace. Available at *http://www.aclu.org/scotus/1998/22639lgl19990222.html*.

[4] The ACLU wrote an amicus brief in *Echazabal*, arguing that an employer violates the ADA when refusing to hire an individual on the basis of her or his disability. The ACLU further argued that allowing individuals to decide what risks—physical, social, or otherwise—she or he is willing to take is at the very core of a person's civil rights. Available at *http://www.aclu.org/images/asset_upload_file411_21954.pdf*.

[5] *See* 42 U.S.C. § 12101(a)(8).

[6] *See* Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

clear under the ADA "whether thinking, communicating and social interaction are 'major life activities.'" [1]

• A pharmacist with diabetes was fired for taking a break to eat during his 10-hour shift. He needed a brief lunch break to properly control his diabetes. He was fired because he continued to manage his disability by the best practice guidelines of proper food intake. The court deemed he was not disabled enough to be protected under the ADA because his diabetes was so well-managed—"Not disabled enough" for protection under the ADA and yet "too disabled" to work.[2]

• A stock merchandiser with lifelong epilepsy was fired after a 5-day absence related to his condition. The court held he was not protected by the ADA because he typically experienced seizures once a week, lasting only 5 to 15 seconds, and his medication caused only "some" adverse side effects. He was fired because of his disability, but the court refused to hear his case because he was "not disabled enough." [3]

RESTORING CONGRESS' INTENT WHEN IT PASSED THE ADA IN 1990

"When we passed the [ADA] there was common agreement on both sides of the aisle, and on the part of President George Herbert Walker Bush and his aides, that the law was designed to protect any individual who is treated less favorably because of a *current, past, or perceived disability* . . . In recent years, the courts have ignored Congress' clear intent as to who should be protected under the ADA. And the courts have narrowed the definition of who qualifies as an 'individual with a disability.' As a consequence, millions of people we intended to be protected under the ADA—including people with epilepsy, diabetes, and cancer—are not protected any more." (Senator Tom Harkin when he introduced the ADA Restoration Act of 2007)

The bipartisan ADA Restoration Act of 2007 will amend the ADA to shift the focus from requiring individuals with disabilities to "prove" their disability to determining whether a person has experienced discrimination "on the basis of disability." By eliminating the Catch–22, the ADA Restoration Act restores the right to be judged based solely on one's qualifications for the job, bringing the ADA in line with other civil rights laws and requiring the courts to interpret the law fairly.

The Disability Policy Collaboration strongly urges Congress to pass the ADA Restoration Act (S. 1881), restoring the original intent of Congress when it passed the ADA in 1990.

NATIONAL COUNCIL ON INDEPENDENT LIVING,
WASHINGTON, DC. 20036,
November 15, 2007.

Hon. EDWARD M. KENNEDY, *Chairman*,
Health, Education, Labor, and Pensions Committee,
U.S. Senate,
Washington, DC. 20510.

Hon. MICHAEL B. ENZI, *Ranking Member*,
Health, Education, Labor, and Pensions Committee,
U.S. Senate,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY, RANKING MEMBER ENZI AND DISTINGUISHED MEMBERS: We are writing on behalf of the National Council on Independent Living (NCIL) to strongly urge you to support the *ADA Restoration Act of 2007, S. 1881.* Since enactment of the Americans with Disabilities Act of 1990, people with disabilities have made substantial strides toward societal inclusion and full participation. However, in recent years, a number of Supreme Court decisions have significantly reduced the protections available to people with disabilities in employment settings. Restoring the act to Congress' original intent would enable people with disabilities to secure and maintain employment without fear of losing their job because of their disability. Congress clearly intended to cover the full spectrum of disabilities, both visible and invisible.

NCIL is the oldest cross-disability, national grassroots organization run by and for people with disabilities. Our members include Centers for Independent Living, State Independent Living Councils, people with disabilities, and other disability

---

[1] *Littleton* v. *Wal-Mart Stores, Inc.*, No. 05–12770, 2007 WL 1379986, at *1 (11th Cir. May 11, 2007).
[2] *Orr* v. *Wal-Mart Stores, Inc.*, 297 F.3d 720, 722 (8th Cir. 2002).
[3] *Todd* v. *Academy Corp.*, 57 F. Supp. 2d 448, 449–50 (S.D. Tex. 1999).

rights organizations. As a membership organization, NCIL advances Independent Living (IL) and the rights of people with disabilities through consumer-driven advocacy. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

A key part of our work is to implement the integration mandate of the Americans with Disabilities Act by moving people with disabilities out of institutions and into community-based settings so they can control their own destinies and live independently. NCIL also works tirelessly to ensure that the Americans with Disabilities Act and other crucial civil rights laws are not only fully implemented, but also enforced.

We welcome the opportunity to comment on this critical civil rights law and look forward to a robust discussion of ways in which we can work together to achieve the full promise of the ADA.

Background: Passed with overwhelming bipartisan support, the Americans with Disabilities Act of 1990 was designed as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Without doubt, the ADA has transformed America's communities, removing barriers to persons with disabilities in the built environment and infrastructure, and has substantively advanced the cause of community integration for people with disabilities.

Issues: Yet, the National Council on Disability documented in its *Righting the ADA* report, a series of flawed Supreme Court decisions have seriously undermined our ability to realize the full promise of the ADA. In *Sutton* v. *United Airlines*, and *Toyota* v. *Williams*, the Supreme Court has taken to interpreting the definition of disability in a restrictive manner that Congress never envisioned, placing the burden on persons with disabilities to prove that they are entitled to the ADA's protections—particularly in the employment sphere. This creates a Catch–22 in which employees can be discriminated against on the basis of their disability but unable to enforce their rights because they cannot meet the high threshold the courts have set to prove they are disabled. Furthermore, in *University of Alabama* v. *Garrett*, the Supreme Court ruled 5–4 that the 11th Amendment prohibits suits in Federal court by State employees to recover money damages under Title I of the ADA. The Supreme Court's restrictive approach to the ADA in employment cases is especially disconcerting since the unemployment of persons with disabilities wishing to work remains widespread.

Proper implementation of the original intent of the ADA in the employment sphere is critical to the economic self-sufficiency and full societal participation of people with disabilities that is at the core of the IL movement. The fact that only 7 percent of persons with disabilities own their own homes and roughly 30 percent of Americans with disabilities are employed is a reflection of the continued inability of persons with disabilities to enforce their right to non-discrimination in the workplace under the Americans with Disabilities Act.

Issues Raised by the U.S. Chamber of Commerce: The U.S. Chamber of Commerce claims that the ADA Restoration Act ensures that protections on the basis of disability apply broadly. This is correct. The Supreme Court did not understand that significant disability as defined by the Americans with Disabilities Act includes people with intellectual disabilities (formerly known as Mental Retardation), epilepsy, diabetes, cancer, and mental illnesses, among others. For a person who merely has poor vision that is correctible, he or she may indeed be considered disabled by a court. The question is not whether a person with a disability has a disability or is regarded as a person with a disability. The question is whether or not the person has been discriminated against on the basis of disability. The intent of S. 1881/H.R. 3195 is to prevent discrimination on the basis of disability, not to create a protected class.

The Chamber of Commerce also alleges that the ADA Restoration Act of 2007 "would reverse the long-standing rule that allows employers to determine what the essential functions of a job are, allowing plaintiffs to second-guess routine job decisions that employers must make every day." There is no such language in S. 1881 to this effect.

The problem with the Supreme Court's and lower courts' decisions referenced in S. 1881/H.R. 3195's "Findings and Purposes" is that they have not even considered whether there has been discrimination based on disability. Therefore, the courts ruled that the plaintiff was either not disabled or not disabled enough to be protected by the ADA. Had the courts properly reviewed these cases, they would have decided them on the basis of whether the plaintiff was qualified to perform the essential functions of the job with or without reasonable accommodation.

The real problem in the Chamber of Commerce's August 22 letter to the U.S. House of Representatives is not their fallacious reasoning, but the blatant prejudice it exhibits against Americans with disabilities. NCIL has members in all but five

congressional districts. Our experience working with businesses in communities across the country over three decades shows that the majority of businesses are more open-minded than the board and staff of the Chamber of Commerce.

NCIL supports: Enactment of the ADA Restoration Act as introduced by Senators Tom Harkin and Arlen Specter and in the House by Majority Leader Steny Hoyer, Rep. James Sensenbrenner, and co-sponsored by more than 220 of their colleagues to remedy decades of purposeful, unconstitutional discrimination and as such should be given a broad, rather than a narrow, construction.

• Funding for ongoing public education on the requirements of the ADA, and adequate funding for strong enforcement by the U.S. Department of Justice, U.S. Equal Employment Opportunity Commission, Federal Communications Commission, and other agencies with enforcement responsibilities;

• Creative efforts by federally funded enforcement, technical assistance, and advocacy organizations to promote the positive aspects of the ADA's accessibility and equal opportunity requirements;

Efforts by States to voluntarily waive their immunity from damage suits brought by people with disabilities under Titles I and II of the ADA, and;

• Bipartisan congressional efforts to overturn Supreme Court decisions narrowing the scope of the ADA, by enacting the ADA Restoration Act, S. 1881/H.R. 3195.

Thank you for your consideration. Please do not hesitate to contact Deb Cotter of our policy staff if you have additional questions or concerns. Deb can be reached at (202) 207–0334 or *deb@ncil.org*.

Sincerely,

JOHN A. LANCASTER,
Executive Director.

KELLY BUCKLAND,
President.

RESPONSE TO QUESTIONS OF SENATOR HATCH BY CAMILLE A. OLSON

Question 1. Does either the Rehabilitation Act of 1973 or the Americans with Disabilities Act equate an impairment with a disability or does each require that, to constitute a disability, an impairment substantially limit a major life activity?

Answer 1. Neither the Rehabilitation Act of 1973[1] nor the Americans with Disabilities Act[2] equates an impairment with a disability. Under both statutes, an impairment must substantially limit a major life activity to meet the definition of a "disability." In enacting the ADA, Congress adopted the definition of "individual with a disability" from Section 504 of the Rehabilitation Act. Both statutes define an individual with a disability using a functional approach, based on the effect the impairment has on the individual's life.[3]

Question 2. Has any State or Federal court ever ruled that, under the Rehabilitation Act, any particular condition is a disability without regard to its effect on a major life activity? Has any State or Federal court ruled that, under the Rehabilitation Act, any particular condition is not a disability regardless of its effect on a major life activity? If so, in either case, please provide citations to such rulings. Please keep in mind that I am not asking whether or not an individual with a particular impairment was found to be disabled, but whether or not a particular impairment was *per se* found to constitute a disability.

Answer 2. No court has recognized a *per se* disability under the Rehabilitation Act. Instead, courts engage in an individualized analysis to determine the existence of a disability.[4] Thus, under the Rehabilitation Act, depending on the condition's im-

---

[1] Pub. L. No. 93–112, *amended by* Pub. L. No. 93–516, 88 Stat. 1617 (1974) (codified at 29 U.S.C. § 701 *et seq*.)

[2] Pub. L. No. 101–336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (1994); 47 U.S.C. § 225711 (2001)).

[3] 42 U.S.C. § 12101(2); 29 U.S.C. § 705(20)(A).

[4] *See, e.g., Rezza* v. *U.S. Dep't of Justice,* No. 87–6732, 1988 WL 48541, at *2 (E.D. Pa. May 16, 1988) (The analysis of "who is a handicapped person under the [Rehabilitation] Act is best suited to a 'case by case determination.'") quoting *Forrisi* v. *Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); *E.E. Black, Ltd.* v. *Marshall,* 497 F. Supp. 1088, 1099 (D. Haw. 1980) (whether a disability is a qualifying handicap under the Rehabilitation Act requires a case-by-case analysis); *Diaz* v. *United States Postal Service,* 658 F. Supp. 484 (E.D. Cal. 1987) (employee with back problems did not have disability under the Rehabilitation Act because the back problems did not substantially limit major life activities); *Schuett Investment Co.* v. *Anderson*, 386 N.W.2d 249 (Minn. App. 1986) (because individual's back injury substantially limited his ability to perform manual tasks he was disabled under the Rehabilitation Act); *Sharon v. Larson*, 650 F. Sup. 1396

pact on the individual, the same impairment can rightly lead to findings that one individual is disabled while another individual with the same impairment is not.[5]

Question 3. Has any State or Federal court ever ruled that, under the ADA, any particular condition is a disability without regard to its effect on a major life activity? Has any State or Federal court ruled that, under the ADA, any particular condition is not a disability regardless of its effect on a major life activity? If so, in either case, please provide citations to such rulings. Please keep in mind that I am not asking whether or not an individual with a particular impairment was found to be disabled, but whether or not a particular impairment was *per se* found to constitute a disability.

Answer 3. Similar to holdings under the Rehabilitation Act, courts have consistently held that there are no *per se* disabilities under the ADA.[6] Conversely, courts have not ruled that any particular condition is not a disability regardless of its effect on a major life activity.[7] Rather, courts generally engage in an individualized analysis to determine whether an individual with an *impairment* is also an individual with a *disability*.[8]

Question 4. Like the Rehabilitation Act, the ADA requires that an impairment substantially limit a major life activity to constitute a disability. The ADA Restoration Act would eliminate the requirement that an impairment substantially limit a major life activity to constitute a disability. Does this change or restore the ADA's definition of disability?

Answer 4. Eliminating the requirement that an impairment substantially limit a major life activity fundamentally changes the ADA's definition of disability. By requiring a substantial limitation on a major life activity, Congress sought to extend protections to the "discrete and insular minority" of disabled individuals who had been "subjected to a history of purposeful unequal treatment."[9]

Thus, inclusion of "substantially limits one or more of the major life activities of such individual" in the ADA's definition of a "disability" demonstrates Congress's deliberate and careful decision to ensure that "minor, trivial impairments such as a simple infected finger" were not covered by the ADA.[10] Without this requirement, even slight impairments would be covered under the definition of a "disability." Such a result would have far-reaching implications, thus expanding the ADA's reach to cover virtually every American. Congress did not intend such a result.

Question 5. Page 22 of the Senate Labor and Human Resources Committee report on the ADA lists various conditions, diseases, and infections. Does the committee report offer these as examples of impairments or examples of disabilities? Does the committee report not state, two paragraphs later, that even these conditions or diseases are not disabilities unless they substantially limit a major life activity?

Answer 5. The Senate Labor and Human Resources Committee Report lists specific "conditions, diseases, or infections" that could constitute physical or mental im-

---

(E.D.Pa. 1986); *Padilla v. Topeka*, 708 P.2d 543 (Kan. 1985) (myopic applicant for police officer position was not handicapped under the Rehabilitation Act).

[5] *Compare Pridemore* v. *Rural Legal Aid Soc*., 625 F. Supp. 1180 (S.D. Ohio 1985) (individual with cerebral palsy was not substantially limited in a major life activity and, therefore, not disabled under the Rehabilitation Act); *with Fitzgerald* v. *Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (individual with cerebral palsy and left side hemiplegia *was* substantially limited in a major life activity and, therefore, disabled under the Rehabilitation Act).

[6] *See generally Bragdon* v. *Abbott*, 524 U.S. 624 (1998) (Individual with AIDS is disabled under the ADA due to substantial limitation on major life activity of reproduction); *Swart* v. *Premier Parks Corp*., 88 Fed. Appx. 366 (10th Cir. 2004) (noting that impairment does not equal disability and holding that individual with migraines that did not interfere with work or a major life activity was not disabled under the ADA); *Reed* v. *Lepage Bakeries, Inc*., 102 F. Supp. 2d 33 (D. Me. 2000), *aff'd* 244 F.3d 254 (1st Cir. 2001) (individual with bipolar disorder was disabled under the ADA).

[7] *Compare Anderson* v. *Indep. Sch. Dist. No. 281*, No. 01–560, 2002 WL 31242212 (D. Minn. 2002) (individual with depression disabled under the ADA); *with Cooper* v. *Olin Corp*., 246 F.3d 1083 (8th Cir. 2001) (individual with depression not disabled under the ADA).

[8] Our research found one case in which a court did not conduct a thorough analysis, choosing instead to cite to Federal decisions holding that AIDS is a disability. *See Hamlyn* v. *Rock Island County Metro. Mass Transit Dist*., 986 F. Supp. 1126 (C.D. Ill. 1997). *Hamlyn* is the exception that proves the rule: courts applying the statute in a principled manner examine an impairment's impact on major life activities.

[9] Remarks of President George Bush at the Signing of the Americans with Disability Act (July 26, 1990), *http://www.eeoc.gov/ada/bushspeech.html* (last visited Dec.19, 2007); 42 U.S.C. § 12107(a)(7).

[10] 29 CFR pt. 1630, App. § 1630.2(j).

pairments.[11] The report makes clear, however, that a person with an impairment is not necessarily a person with a disability. Rather, for purposes of the first prong of the ADA's definition of disability, a physical or mental impairment constitutes a disability only when it results in a "substantial limitation on one or more major life activities."[12] The report explains that a person who is paraplegic, for example, will have a substantial difficulty in the major life activity of walking.[13] However, even being paraplegic is not a *per se* disability. Rather, the ADA's functional approach requires a case-by-case analysis of how a specific physical or mental impairment affects an individual's major life activities.

By removing the requirement that an impairment result in a substantial limitation of one or more major life activities, the ADA Restoration Act of 2007 would nullify the important distinction between an "impairment" and a "disability" drawn by Congress. Under S. 1881's proposed definition of a disability, "[p]ersons with minor, trivial impairments, such as a simple infected finger . . ."[14] would be *per se* disabled and, therefore, covered by the ADA. This contravenes Congress's intent together with Rehabilitation Act protections that underlie this intent. Finally, a *per se* approach would reintroduce paternalistic labels that disability statutes were intended to eliminate by labeling as "disabled" all individuals with impairments of any sort or degree—regardless of whether those impairments are functionally limiting.

Question 6. In a February 1986 Report titled *Toward Independence* (linked here: *http://www.ncd.gov/newsroom/publications/1986/toward.htm*), the National Council on Disability discussed different approaches for estimating "the number of Americans with disabilities." The "health conditions approach" would include "all conditions or limitations which impair the health or interfere with the normal functional abilities of an individual." This is still a functional definition, though its "interfere with the normal functional abilities" standard is more lenient than the "substantially limit a major life activity" standard in the Rehabilitation Act and the ADA. The NCD report said that this definition would cover more than 160 million people, or two-thirds of the United States population at the time. This would be more than 200 million people today, at least four times as many as the disabled population you identified in your prepared testimony and five times as many as the disabled population identified in the ADA. The ADA Restoration Act would be broader still, eliminating any requirement that a condition limit function. Would the ADA Restoration Act not include as disabled the large majority of the U.S. population, far more than the ADA covers? Did Congress intend such a result?

Answer 6. The ADA Restoration Act of 2007,[15] as drafted, would include as disabled the large majority of the United States population—substantially more than the ADA currently covers. By removing the requirement that an impairment substantially limit a major life activity to constitute a disability, coupled with prohibiting the consideration of individual mitigating measures, S. 1881 would greatly expand the ADA's reach, while at the same time diminishing its meaning.

Because any "impairment" would suffice to qualify as a disability under S. 1881, employers would be obliged to address accommodation requests from individuals with high cholesterol, back and knee strains, colds, tennis elbow, poison ivy, an occasional headache, and myriad other minor conditions that go far beyond any reasonable concept of disability. Congress did not intend such a result.

In conclusion, rather than simply restoring the ADA's original purpose, S. 1881 imposes significant new obligations on the employer community and expands the ADA to cover virtually all persons with impairments of any kind.

[Whereupon, at 4:00 p.m., the hearing was adjourned.]

○

[11] S. Rep. No. 101–16, at 22 (1990).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] S. 1881, 110th Cong. (2007).